Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

DAVID NEMELKA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where an indictment which is facially sufficient is dismissed based upon the Government's judicial admission that it will be unable to prove one of the requisite elements of the alleged crime, does *Finch v. United States,* 433 U.S. 676, 97 S. Ct. 2909, 53 L. Ed. 2d 1048 (1977), preclude review under 18 U.S.C. § 3731 because the double jeopardy clause of the United States Constitution prohibits further prosecution?

2. Where a defendant's only alleged involvement in a fraudulent scheme is the payment of purported kickbacks, does *McNally v. United States,* 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), require a nexus between the alleged kickbacks and the alleged victims' loss of money or property in a prosecution for mail fraud under 18 U.S.C. § 1341?

LIST OF PARTIES

The parties to the proceedings in the court below were:

Defendants-Appellees:

Richard T. Marchese, Orville Leroy Sandberg, David R. Nemelka and Laura Lee Sorenson

Plaintiff-Appellant:

United States of America

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I. The decision below conflicts with Supreme Court law, and the Court of Appeals departed from the accepted and usual course of judicial proceedings, as well as sanctioning a departure by the lower court, so as to call for an exercise of this Court's power of supervision: under *Finch v. United States*, 433 U.S. 676, 97 S. Ct. 2909, 53 L. Ed. 2d 1048 (1977), jeopardy had attached and the Court of Appeals was without jurisdiction to hear this

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appeal; the Court of Appeals departed from the usual course of judicial proceedings in using its decision on the merits of the appeal to justify its exercise of jurisdiction in connection therewith; and the District Court specifically structured its order to attempt to prevent the attachment of jeopardy, in circumvention of the United States Constitution, when under the facts of the case, jeopardy had indeed attached. 12

II. The decision below presents an important, unanswered question, and conflicts with Supreme Court law: *McNally v. United States,* 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), requires that, for the government to prove mail fraud pursuant to 18 U.S.C. § 1341 (as it was in effect during the relevant time period), it must prove some nexus between the alleged loss of property and the kickbacks allegedly paid by Petitioner. .. 18

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OPINIONS BELOW

The decision and final judgment of the United States District Court for the District of Colorado, dismissing an indictment against Petitioner, is not reported. (App. B, 9a-12a). The decision of the Tenth Circuit Court of Appeals, holding that it had jurisdiction to hear the appeal and reversing the trial court, stating that a nexus between the alleged kickbacks and the alleged victims' money is not necessary, is reported. *United States v. Marchese, et al.*, 46 F.3d 1020 (10th Cir. 1995). (App. A, 1a-8a).

There was also an initial pretrial decision by the United States District Court for the District of Colorado, declining to dismiss the indictment, which was reported. *United States v. Marchese, et al.*, 838 F. Supp. 1424 (D. Colo. 1993). (App. C, 13a-21a).

STATEMENT OF JURISDICTION

This Court's jurisdiction to review an order and final judgment of the United States Court of Appeals for the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

Petitioner was a defendant in a criminal matter pursuant to an indictment brought by the Respondent United States in the United States District Court for the District of Colorado. Jurisdiction was appropriate in that Court pursuant to 18 U.S.C. § 3231. A final judgment in Petitioner's favor was entered by the District Court on March 21, 1994, and Respondent timely filed a Notice of Appeal to the Tenth Circuit Court of Appeals on March 28, 1994. While Petitioner claims that jurisdiction was inappropriate in the Tenth Circuit Court of Appeals since the double jeopardy clause of the United States Constitution prohibited further prosecution, the Tenth Circuit held, on January 31, 1995, that it did have federal appellate jurisdiction over the

final judgment of the District Court pursuant to 18 U.S.C. § 3731, and entered its judgment in the case.

Defendant Orville LeRoy Sandberg filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc in the Court of Appeals. Defendant Richard Marchese and Petitioner moved to join in that Motion. The Petition for Rehearing was denied on March 8, 1995. (App. D, 22a- 23a).

This Petition for Writ of Certiorari is timely filed within ninety days of January 31, 1995, the date judgment was entered by the Tenth Circuit.

STATUTES INVOLVED

18 U.S.C. § 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

18 U.S.C. § 1341 (1987):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of loan, exchange, alter, give away, distribute, supply,

> or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office of authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j)(11), 84 Stat. 778.)

STATEMENT OF THE CASE

A. Procedural History

Petitioner was one of four defendants indicted in the United States District Court for the District of Colorado (the "District Court") in a thirty-four count mail fraud and money laundering indictment. The Government alleged that Petitioner, working with Defendants Richard T. Marchese ("Mr. Marchese"), Laura Lee Sorenson and Orville LeRoy Sandberg ("Mr. Sandberg"), schemed to defraud the customers of Power Securities Corporation ("Power") in connection with their purchase of certain stocks. Petitioner's initial motion to dismiss the

indictment was denied by the District Court by Order dated December 7, 1993, which Order sets forth the law of the case (the "Law of the Case").

Subsequently, Petitioner and the other defendants waived their right to a jury trial in the District Court. (App. G, 79a-94a). The Government consented to a waiver of the jury trial and the District Court ordered a jury waiver on or about February 18, 1994. (App. H, 95a).

Petitioner filed a Motion for Clarification of the Law of the Case ("Motion for Clarification") after being informed that the Government intended to establish mail fraud and money laundering in ways which Petitioner believed were inconsistent with the indictment and the Law of the Case. After hearing argument on the Motion for Clarification at a previously-scheduled status hearing on March 11, 1994, the District Court requested further briefing on the issue of whether the indictment complied with the dictates of *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987). On March 17, 1994, the District Court held a second hearing on the Motion for Clarification and ruled that, under *McNally* and its progeny, the Government's theory was improper. On Monday, March 21, 1994, the District Court held a third hearing on Defendant's Motion for Clarification and entered its Order dismissing the indictment. The District Court ruled that the indictment was insufficient because, without a showing that a nexus existed between the alleged kickbacks and the alleged victims' deprivation of money or property, the indictment alleged only "the defrauding of Power's customers of their right to honest and fair brokers, an interest too ethereal in itself to fall within the protection of the mail fraud statute, which 'had its origin in the desire to protect individual property rights.' *Carpenter [v. United States]*, 484 U.S. at 25 (quoting *McNally*, 483 U.S. at 359 n.8.)." (App. B, 10a).

On March 28, 1994, the Government filed its appeal alleging that jurisdiction was proper pursuant to 18 U.S.C. § 3731. On April 12, 1994, Petitioner filed a Motion to Dismiss the Appeal stating that because the District Court, which was the trier of facts, had based its decision to dismiss the indictment on a judicial admission by the Government, jeopardy had attached and the Court of Appeals did not have jurisdiction to hear the appeal. On June 1, 1994, Petitioner's Motion to Dismiss was referred to the panel hearing the merits of the appeal.

The Tenth Circuit reversed the District Court's dismissal of the indictment. The court found that jeopardy had not attached because the indictment was dismissed pursuant to a pre-trial motion made by the defendants. The court further stated that the District Court's dismissal would constitute the functional equivalent of an acquittal only if the judge had considered evidence which would have constituted a defense on the merits, and held that since "we find in this opinion that tracing is not a requisite to establishing a case of mail fraud, the evidence surrounding this issue would not constitute a defense on the merits." (App. A, 5a). The court then held the District Court had erred in determining that, under *McNally*, it was necessary for the Government to establish a nexus between the money paid by Power's customers and the alleged kickbacks paid by Petitioner to Power.

Defendant Sandberg filed a Petition for Rehearing and Suggestion for Rehearing En Banc on or about February 21, 1995, arguing that the court had misconstrued certain issues of fact and law. This Motion was joined by Petitioner. The court denied the Petition for Rehearing on March 8, 1995.

This Petition seeks review of the Judgment and Order of the Tenth Circuit Court of Appeals insofar as it held that jeopardy had not attached and insofar as it held "[t]he fact that the government

concedes that it cannot trace the funds paid by Power's customers for the securities back through to the Defendant does not fatally flaw the indictment." (App. A, 8a).

B. Statement of the Facts

Petitioner is a businessman residing in Utah. For many years commencing in the late 1970's, Petitioner's primary business consisted of aiding in the formation of small companies and promoting the sale of stock associated with those companies. In the mid-1980's, Petitioner began taking small companies public by way of a "reverse merger". In a reverse merger, a small public company (the "Merger Company") is created for the sole purpose of seeking out a private company which might offer favorable business opportunities. The Merger Company merges with the private company, thereby making the private company a public company without the need to conduct an initial public offering of the private company's stock. These Merger Companies, which were created and sanctioned by the United States Government as viable entities and appropriate merger vehicles, were commonly referred to as "blind pools".

Petitioner helped establish several blind pools, becoming an investor in many, and also aided in finding appropriate business opportunities with which blind pools could merge through the reverse merger process. Petitioner did not know of Power nor had he met any of its principals or other employees until May of 1987, when he became acquainted with Mr. Marchese and Mr. Sandberg. Petitioner was never employed by Power nor was he a shareholder of Power nor in any other way connected with Power.

The charges against Petitioner in the indictment stem from his participation in reverse mergers concerning four stock issues. The Government alleged that Petitioner committed mail fraud and money laundering related to the four stocks by entering into a

scheme with the other three defendants to defraud Power's customers and that Petitioner's part in the "scheme" was that he secretly controlled, gathered up the stock in the four issues and subsequently made certain kickback payments to Power's principals in exchange for Power's purchase from him of the stock.

This "scheme" as alleged by the Government was essentially divided into three parts. The first "phase", as alleged by the Government, involved the creation of the blind pools by Petitioner and the collection of the publicly-traded stock into a privately-held company ("Phase One"). The second "phase" involved Petitioner's sale of the stock directly to Power, not to Power's customers ("Phase Two"). The third "phase" involved two unrelated aspects: (a) Power's marketing of the stock and (b) Petitioner's alleged payment of kickbacks to Power's principals for Power's purchase of the stock from Petitioner ("Phase Three"). The alleged payment of kickbacks was unrelated to Power's marketing of the stock or to Power's sale of the stock to its customers, but was based upon and resulted from the sale of stock by Petitioner directly to Power. The Government conceded in documents filed in the District Court that Phases One and Two standing alone "could be viewed as perfectly legal" and indeed that they appeared "legitimate". Thus, by virtue of elimination, Phase Three, which involved Power's marketing of the stock and Petitioner's alleged payments of kickbacks to Messrs. Marchese and Sandberg, must be illegal for the "scheme" as alleged in the indictment to constitute a "scheme to defraud."

The "scheme" described in the indictment is essentially one of the deprivation of "honest services", in which the mail fraud charges are based upon the allegation that Power's customers were deprived of their right to the honest and faithful services of their brokers. Illustrative of the "scheme" is that the primary allegation of fraud in this case was that Power's customers were

given copies of a brochure which "fraudulently" stated, "Power Securities Corporation is a business which was founded on the trust of investors, and has prospered because we have their interests in mind." (App. F, 60a). The brochure continued to "fraudulently" state:

> We built Power Securities Corporation as a business with three basic rules as our foundation . . . the exact foundation that the great industries of our nation were built on:
>
> Rule 1. The Client comes First. We have to handle his Money as if it is our last dollar.
>
> Rule 2. The Broker comes Second. He has to work hard ever day and night to keep his clients fully informed.
>
> Rule 3. The House comes Last. We must treat our brokers with respect and give them full support in their efforts to honor rule Number One. We will make no "profit" at the expense of Number One or Number Two.

(App. F, 60a).

Nowhere was it alleged that Petitioner, an independent businessman, made any misrepresentations to Power's customers (nor could he have done so, since he was not involved, nor was it alleged that he was involved, in any way with Power's marketing of the stock). Further, and most importantly, nowhere did the Government allege that Petitioner was a party to any agreement as to the way Power was to market the stock to its customers. Thus, for Petitioner to have been involved in any alleged scheme to defraud, there had to exist some link between his involvement

in the alleged scheme (*i.e.*, the payment of the kickbacks) and some property right of Power's customers.

On October 18, 1993, Petitioner moved to dismiss the indictment under the principles set forth in *McNally*, based on the fact that the indictment failed to allege that the purported victims of the "kickback scheme", *i.e.*, Power's customers, sustained any property deprivation as a result of the payment of such kickbacks by Petitioner. The Government responded to that Motion contending in part that the case was not one based on "honest and faithful services" but rather the evidence would show, *inter alia*, that Power's customers' money was used in the alleged "kickback scheme" because "Power . . . used its customers' funds to pay Petitioner for the stock."

After hearing argument on the Motion to Dismiss, the District Court issued a written order on or about December 7, 1993, holding that, "to sustain the mail fraud charges here, the indictment must allege that the funds for the kickback came from or was [sic] intended to come from the purchase or sale of securities to Power customers". The court further held that:

> [T]he mail fraud charges survive the defendants' challenge under *McNally* because a property right, the purchase and sale of stock by Power's customers, was placed at risk by the alleged fraudulent scheme. Furthermore, the kickbacks, which Nemelka allegedly paid to Marchese and Sandberg, came from the sale of securities to Power's customers.

(App. C, 17a).

Subsequently, the Government, in a written pleading, made

the judicial admission that it could not "prove that the funds for the kickbacks from Nemelka to Marchese and Sandberg came from the sale of securities to any Power customers ." (App. I, 100a).

At the argument on March 17, 1994, the District Court stated that it believed the Government did have to show a nexus between the alleged kickbacks and Power's customers' money, and that by stating that it could not and would not prove that, the Government was essentially admitting that it could not prove its case. On March 21, 1994, the court dismissed the indictment and issued its written ruling stating that, given the way the Government had postured its case, the indictment was insufficient because it did not contain all the elements necessary to sustain the mail fraud charges under *McNally*, and further holding that because the money laundering charges were predicated on mail fraud, they too must fail. The Government then appealed the case to the United States Court of Appeals for the Tenth Circuit citing jurisdiction pursuant to 18 U.S.C. § 3731.

Petitioner contended that the Tenth Circuit Court of Appeals did not have jurisdiction to hear the appeal since, under the stated record in the District Court, jeopardy had attached to the Petitioner. Petitioner further contended that in the event the court held that jurisdiction was proper, the District Court correctly interpreted the holding of *McNally* and its Tenth Circuit progeny, specifically *United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988), in determining there must be some nexus between the alleged kickbacks and Power's customers' money, and that the Tenth Circuit was bound to follow *Shelton* and uphold the District Court 's dismissal of the indictment. The Tenth Circuit reversed the judgment of the District Court, holding initially that jeopardy had not attached and then holding that the Government did not need to show a nexus between money paid by Power's customers and the alleged kickbacks paid to Messrs. Marchese and

Sandberg in order to establish the requisite property loss pursuant to *McNally*.

Although a Petition for Rehearing was filed in the Tenth Circuit and thereafter denied, this appeal is from the judgment of the Tenth Circuit on January 31, 1995, insofar as it found that jeopardy had not attached, and reversed the District Court's dismissal of the indictment.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH SUPREME COURT LAW, AND THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS WELL AS SANCTIONING A DEPARTURE BY THE LOWER COURT, SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION: UNDER *FINCH v. UNITED STATES*, 433 U.S. 676, 97 S. Ct. 2909, 53 L. Ed. 2d 1048 (1977), JEOPARDY HAD ATTACHED AND THE COURT OF APPEALS WAS WITHOUT JURISDICTION TO HEAR THIS APPEAL; THE COURT OF APPEALS DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS IN USING ITS DECISION ON THE MERITS OF THE APPEAL TO JUSTIFY ITS EXERCISE OF JURISDICTION IN CONNECTION THEREWITH; AND THE DISTRICT COURT SPECIFICALLY STRUCTURED ITS ORDER TO ATTEMPT TO PREVENT THE ATTACHMENT OF JEOPARDY, IN CIRCUMVENTION OF THE UNITED STATES CONSTITUTION, WHEN UNDER THE FACTS OF THE CASE, JEOPARDY HAD INDEED ATTACHED.

The decision of the Tenth Circuit Court of Appeals in connection with the double jeopardy issue conflicts with this Court's decision in *Finch v. United States*, 433 U.S. 676, 97 S. Ct. 2909, 53 L. Ed. 2d 1048 (1977). Additionally, the circular reasoning applied by the Tenth Circuit in reaching that decision departs from the accepted and usual course of judicial proceedings, as did the action of the District Court in consciously structuring its order in an attempt to avoid the attachment of jeopardy when in fact the circumstances under which the order was entered did result in the attachment of jeopardy under the United States Constitution.

The decision that jeopardy had not attached in this case conflicts with this Court' s decision in *Finch v. United States, supra.* The facts in *Finch* are strikingly similar to those in this case. In *Finch,* the District Court initially denied a motion to dismiss the indictment and ruled that it was sufficient on its face. In the instant case, the District Court initially denied a motion to dismiss, holding that the indictment was sufficient on its face. Thereafter, in *Finch,* an Agreed Statement of Facts was submitted to the court. Here, the Government made a judicial admission that it would not be able to prove certain of the allegations contained in the indictment. In *Finch,* the District Court then reconsidered its denial of the motion to dismiss the indictment, and "dismissed the information for failure to state an offense." 433 U.S. at 676. Here, the District Court reconsidered its denial of the motion to dismiss and determined that, "[a]s the government postures its case, the indictment does not survive the defendants' challenge under *McNally* and its progeny." (App. B, 10a). In *Finch,* Mr. Justice Rehnquist, in his dissenting opinion, expressed concern that there was no indication that both the petitioner and the government had waived a jury trial and consented to allow the District Court to decide the issue of guilt or innocence. Here, the Petitioner and the Government had waived jury trial, and the District Court had approved that waiver. Therefore, at the time the District Court entered its order, all parties had agreed that the District Court was empowered to determine the issue of guilt or innocence. Under these circumstances, this Court decided that "the Court of Appeals was without jurisdiction to entertain the appeal" stating that "[b]ecause the dismissal was granted prior to any declaration of guilt or innocence, 'on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged,' [cite omitted], we hold that the Government's appeal was barred by the Double Jeopardy Clause." 433 U.S. at 677.

Since the District Court considered evidence beyond the indictment in making its determination that the government could not meet its burden under *McNally* and its progeny, jeopardy has attached. Although no formal witnesses were called, evidence in the form of the Government's judicial admission was considered by the trier of fact before the indictment was dismissed. This is the functional equivalent of a judgment of acquittal on the merits and is precisely the type of situation in which this Court, in *Serfass v. United States,* 420 U.S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975), envisioned that jeopardy would attach.

In *Serfass,* the district court judge, in a jury trial, dismissed the indictment pre-trial after considering material facts from the defendant's affidavit, from the oral stipulation of counsel at argument and from certain other evidence. This Court held that jeopardy had not yet attached and thus the government could appeal under 18 U.S.C. § 3731, because:

> [Defendant] was not then, nor has he ever been, "put to trial before the trier of facts." The proceedings were initiated by his motion to dismiss the indictment. *[Defendant] had not waived his right to a jury trial,* and, of course, a jury trial could not be waived by him without the consent of the Government and of the court. [Cites omitted.] *In such circumstances, the District Court was without power to make any determination regarding [defendant's] guilt or innocence.*

420 U.S. at 389 (emphasis added). Here, unlike in *Serfass,* Petitioner had waived his right to a jury trial and was before the very trier of fact who had jurisdiction to determine his guilt or innocence. The trier of fact considered evidence (or the lack

thereof) in determining that the Government's case was insufficient. Regardless of how the District Court phrased its Order, its ruling was the functional equivalent of a judgment of acquittal, and jeopardy had attached. It would have been futile for the District Court, as the trier of fact, to listen to two months of testimony when, based on its own judicial admission, the Government would have been unable to prove its case against Petitioner and the other defendants.

The actions of the District Court in specifically structuring the contents of its Order to avoid the attachment of jeopardy is so far outside the accepted and usual course of judicial proceedings as to require this court's supervision. The District Court was aware that its ruling was the functional equivalent of a judgment of acquittal. The Court stated that "in terms of procedure,the essence of what I have ruled is a rule 29 judgment of acquittal after opening statements." (App. E, 44a). The court continued by stating:

> [THE COURT]: . . . I want to be very cautious about how we posture this procedurally, because it has very important ramifications for the government's interest either via a dismissal without prejudice or judgment of acquittal and the right — well, if it's a judgment of acquittal, I am not sure you have the right to appeal it.
>
> MR. RAFFERTY: We do not, your Honor.

The court expressed its concern about protecting "the government's interest", but had no such concern for the interests of Petitioner under the Double Jeopardy Clause of the United States Constitution.

In an apparent attempt to circumvent the protections afforded to the Petitioner by the United States Constitution, the District Court structured its Order to constitute a mere dismissal of the indictment, despite the fact that the court had previously held that the indictment was sufficient on its face (App. E, 38a, 51a), and that it would not be "intellectual[ly] honest" to find the indictment insufficient. (App. E., 46a, 51a). In fact, the indictment specifically alleges that the kickbacks came "from the sale of the securities." (App. F, 61a). Thus it was not the indictment which was insufficient, it was the Government's proof concerning those allegations.

The District Court cannot be allowed to interfere with Petitioner's constitutional rights by attempting to avoid the attachment of jeopardy under circumstances where it would have attached to Petitioner had the District Court's Order accurately reflected its actions.

The Tenth Circuit's reasoning as to why jeopardy had not attached is circular, does not stand up to a logical analysis and is so far outside the accepted and usual course of judicial proceedings as to require supervision. The Tenth Circuit admits that, if the evidence considered by the District Court could constitute a defense on the merits, then its dismissal of the indictment would "function as the equivalent of an acquittal", *citing United States v. Brewster,* 408 U.S. 501, 506, 92 S. Ct. 2531, 2534, 33 L. Ed. 2d 507 (1971). (App. A, 5a). The evidence being considered by the Tenth Circuit concerned the issue of whether there was a nexus between the kickbacks and a property right of the victims of the alleged scheme, and consisted of a judicial admission by the Government that it would be unable to prove this element of the alleged crime. A judicial admission is evidence and can form the basis of a judgment. *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1099 (10th Cir. 1991). The Tenth Circuit finds that, since it has determined in the same appeal that

such a nexus was not a required element, the evidence would not have constituted a defense to the merits.

What the Tenth Circuit ignores is the fact that it cannot use its determination in the appeal to decide whether it has jurisdiction to hear the appeal, since without such jurisdiction, it could not have made that determination. Consider, for example, a case in which the question of jeopardy was not at issue, for instance, a jury trial in which the jury returned a judgment of acquittal. Assume that the judgment of acquittal was based upon a jury instruction which provided that a nexus was required between the kickbacks and the victim's deprivation of property. The Government would be unable to appeal that judgment of acquittal, because of the double jeopardy clause, even though, if it were capable of being appealed, the appeals court might determine that the jury instruction was improper, and that the jury should not have acquitted on that basis. The same is true here. The District Court entered the functional equivalent of a judgment of acquittal based upon its determination that the absence of such a nexus was a defense on the merits to the alleged crime. At that point, jeopardy attached, whether or not the District Court was correct in its analysis that the nexus was an important element of the crime.

The Tenth Circuit improperly determined that it had jurisdiction to hear an appeal based upon its subsequent determination in that appeal. Such decision is circular and outside the accepted and usual course of judicial proceedings. Jeopardy attached when the District Court determined that the judicial admission of the Government constituted a defense on the merits on behalf of the Petitioner, and entered the functional equivalent of a judgment of acquittal in connection therewith. This deprives the Court of Appeals of jurisdiction to determine whether the District Court was correct in its analysis of the effect of that Governmental judicial admission.

II.

THE DECISION BELOW PRESENTS AN IMPORTANT, UNANSWERED QUESTION, AND CONFLICTS WITH SUPREME COURT LAW: *McNALLY v. UNITED STATES*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), REQUIRES THAT, FOR THE GOVERNMENT TO PROVE MAIL FRAUD PURSUANT TO 18 U.S.C. § 1341 (AS IT WAS IN EFFECT DURING THE RELEVANT TIME PERIOD), IT MUST PROVE SOME NEXUS BETWEEN THE ALLEGED LOSS OF PROPERTY AND THE KICKBACKS ALLEGEDLY PAID BY PETITIONER.

This case presents the important unanswered question of the meaning of "deprivation of property" in the context of mail fraud indictments based upon the payment of kickbacks to one who owes a duty of honest and faithful services to the alleged victims. The question is important because the meaning of "deprivation of property" under such circumstances, which seemingly was disposed of by *McNally*, has been determined inconsistently in the circuits. The court below held that, under *McNally*, the Government need not establish a nexus between money paid by the purported victims to the fraudulent scheme and alleged kickbacks paid by Petitioner to Power. This is inconsistent with both *McNally* and court of appeals' cases after *McNally* which have held that if such a nexus is not present, the only possible way to comply with *McNally is* the imposition of a constructive trust, which theory has been universally rejected.

In *McNally*, this Court determined that the mail fraud statute could not be used in instances in which the alleged scheme to defraud was designed to deprive individuals of intangible rights, such as the right to honest and faithful services. Subsequently, in *Carpenter v. United States*, 484 U.S. 19, 108 S. Ct. 316, 98 L. Ed.

2d 275 (1987), this Court further explained that a "contractual right to . . . honest and faithful services" was "an interest to ethereal in itself to fall within the protection of the mail fraud statute."[1]

In *McNally*, the governmental official in control of the selection of insurance agencies for the state of Kentucky entered into an agreement with a particular agency that the agency could issue the state's workers' compensation policy so long as the commissions for the policy were shared with other specified agencies, including some in which the official had a personal interest. This Court, in holding that no deprivation of property had occurred sufficient to satisfy the mail fraud statute, focused in part on the fact that while the governmental official had received part of the commissions, "those commissions were not the Commonwealth's money." 483 U.S. at 360.

Similarly, in this case, no deprivation of property has occurred since, while Power's principals received a portion of Petitioner's profits from the sale of his stock, those profits were not comprised of money which was obtained from Power customers. In fact, it was Power's own money which was being "rebated" to Power in connection with the stock transaction, and was in no way connected to or related to the later purchase of that stock from Power by Power's customers.

The purported criminality of Petitioner's actions is even more attenuated than in a normal kickback case, since normally it is the person receiving the kickback who is being prosecuted

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1. Congress subsequently amended the mail fraud statute to permit "honest and faithful services" charges to survive, effective as of November 18, 1988. *See* 18 U.S.C. § 1346. With only one exception, the counts for alleged mail fraud against Petitioner and the other defendants in this case occurred prior to November 18, 1988. The Government did not contend below that this particular count should survive.

therefor, not the person paying the kickback . For example, in *United States v. Richerson,* 833 F. 2d 1145 (5th Cir. 1987), the defendant was convicted of accepting kickbacks from suppliers of his employers. Even under such circumstances, his conviction was upheld specifically because it was the employer's money which was used to pay those kickbacks, since the suppliers had submitted false invoices to the employers to obtain money for the kickbacks. The mere fact that one has paid a "rebate" upon the sale of property cannot implicate one in a fraudulent scheme. If the payment of a rebate on the sale of personal property were a crime, every automobile company which offered a rebate to salesmen on the sale an automobile would be criminally liable.

Absent some nexus between the money that the alleged victims paid to Power and the alleged kickbacks, there simply does not exist a property interest which was placed at risk sufficient to satisfy *McNally.* This is particularly true where, as here, Petitioner's only alleged involvement in the "scheme to defraud" was through the payment of the kickbacks. Absent some link between the kickbacks and Power's customers, Petitioner cannot be alleged to have participated in a "scheme to defraud" Power's customers of any property right. Absent that link, at most Petitioner participated in a transaction about which others may have subsequently made misrepresentations, which does not render him liable for involvement in their scheme to defraud. *See United States v. Bailey,* 859 F.2d 1265, 1273 (7th Cir. 1988), *cert. denied,* 488 U.S. 1010, 109 S. Ct. 796, 102 L. Ed. 2d 781 (1989) (mere participation in a transaction which turns out to be part of a fraudulent scheme will not support conviction without proof of willful participation in the scheme). This does not tie Petitioner in any way to any property deprivation of the alleged victims. Under circumstances where the only alleged involvement in a fraudulent scheme is the payment of kickbacks, from funds entirely unrelated to any loss of property on the part of the purported victims, *McNally* prevents prosecution under the mail fraud statute.

Further, court of appeals' cases following *McNally* and *Carpenter* have correctly held that a case based upon a constructive trust theory is also insufficient to uphold mail fraud charges. In *United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988), county commissioners accepted kickbacks in connection with purchases made by the county. The kickbacks were paid out of the suppliers' profits, just as the kickbacks here were paid out of Petitioner's profits. The Tenth Circuit Court of Appeals reversed the mail fraud conviction, rejecting an equitable or constructive trust theory to support mail fraud which is otherwise grounded solely in the deprivation of intangible rights. Other Circuits construing the application of *McNally* under a constructive trust theory have almost universally declined to permit recovery. *See United States v. Ochs*, 842 F.2d 515, 526 (1st Cir. 1988) ("the mere fact that a fiduciary profits from a breach of duty is not a sufficient property deprivation to satisfy the requirements of the mail fraud statute if the profit was not, directly or indirectly, at the principal's expense"); *United States v. Zauber*, 857 F.2d 137, 146 (3rd Cir. 1988) (rejecting constructive trust theory as inconsistent with *McNally); United States v. Slay*, 858 F.2d 1301, 1316 , n. 4 (8th Cir. 1988) (rejecting application of constructive trust theory to persons accused of scheming to pay bribes); *United States v. Walgren*, 885 F.2d 1417 (9th Cir. 1989) (constructive trust theory is inconsistent with *McNally); United States v. Goodrich*, 871 F.2d 1011, 1014 (11th Cir. 1989) (constructive trust theory could not be applied to bribery schemes).

CONCLUSION

Jeopardy attached in this case when the District Court dismissed the indictment based upon a judicial admission by the Government that it could not prove an essential element of its case. The Tenth Circuit Court of Appeals did not have jurisdiction to hear an appeal from the District Court's dismissal of the indictment under such circumstances.

The decision below conflicts with the proper definition of property interest in 18 U.S.C. § 1341 as it has been interpreted by this Court in *McNally* and *Carpenter* and conflicts with other Circuit Court precedent. This case presents an important unanswered question about whether a nexus is required between kickbacks and the victims' loss of money or property, where a defendant's only alleged involvement in a fraudulent scheme is the payment of purported kickbacks. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A — TENTH CIRCUIT COURT OF APPEALS DECISION - FILED JANUARY 31, 1995 (46 F.3d 1020)

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 94-1149

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

RICHARD T. MARCHESE, LAURA LEE SORENSON, ORVILLE LEROY SANDBERG, DAVID R. NEMELKA,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 93-CR-008-B)

Kenneth R. Buck, Assistant United States Attorney (Henry L. Solano, United States Attorney, and Gerald J. Rafferty, Assistant United States Attorney, with him on brief), Denver, Colorado, for Plaintiff-Appellant.

Leonard E. Davies, Denver, Colorado, for Defendant-Appellee Richard T. Marchese.

Stephen L. Waters, Denver, Colorado, for Defendant-Appellee David R. Nemelka.

John Henry Schlie, Denver, Colorado, for Defendant-Appellee Orville Leroy Sandberg.

Appendix A

Before KELLY and HENRY, Circuit Judges, and BURCIAGA, District Judge.†

KELLY, Circuit Judge.

The government appeals from the district court's dismissal of a thirty-four count indictment charging Defendants-Appellees, Richard Marchese, Orville Sandberg, David Nemelka, and Laura Lee Sorenson, with mail fraud in violation of 18 U.S.C. § 1341 and money laundering in violation of 18 U.S.C. § 1956. We have jurisdiction pursuant to 18 U.S.C. § 3731 and reverse.

Background

The government charged Defendants with thirty-four counts of mail fraud and money laundering, alleging a scheme to defraud the customers of Power Securities Corporation ("Power"). The district court dismissed the indictment, finding that the government had only implicated the right of Power's customers to "honest and faithful brokers," and hence no property right was taken or placed at risk as required by *McNally v. United States*, 483 U.S. 350, 356 (1987).

The indictment identified Defendants Marchese and Sandberg as owners and directors of Power, a broker-dealer specializing in the sale of penny stocks. Defendant Nemelka was a stock promoter and Defendant Sorenson was his assistant. The indictment alleged that beginning on or about May 1987, and continuing until January 1993, Defendants engaged in the unlawful scheme by inducing Power's customers to purchase and

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† The Honorable Juan G. Burciaga, Senior United States District Judge for the District of New Mexico, sitting by designation.

sell penny stocks through the use of false or misleading statements or omissions. Allegedly, Defendants Marchese and Sandberg made false representations to Power's customers to induce them to buy and sell certain publicly traded securities. The Defendants failed to disclose that these stocks were secretly controlled by Defendant Nemelka and that Defendants Marchese and Sandberg were to receive kickbacks for retailing the Nemelka-controlled securities.

On October 18, 1993, Defendants Nemelka and Marchese filed a motion to dismiss the indictment. The district court initially denied these motions on December 7, 1993.

On February 18, 1994, with the acquiescence of the government and the trial court, all four Defendants waived their right to a jury trial. On March 11, 1994, Defendants Nemelka, Sorenson, Sandberg (and later Marchese) filed a motion for clarification concerning the court's December 7th order denying the motions to dismiss the indictment. The court then asked all parties to submit briefs on the issue of whether the indictment complied with the dictates of *McNally v. United States*, 483 U.S. 350 (1987).

On March 17, 1994, the district court held a second hearing and ruled that according to *McNally* and its progeny, the prosecution's theory was improper. The next day, Defendant Marchese filed a motion requesting an order dismissing the indictment, stating that the government could appeal any dismissal. On March 21, 1994, the district court held a third hearing. Concluding that all of the necessary elements for mail fraud could not be established because the government could not trace property of the customer back to the kickbacks, the court dismissed the entire indictment, including the money laundering charges which stemmed from the predicate charges of mail fraud.

Appendix A

I. *Discussion*

A. Double Jeopardy

Defendants contend that during arguments on the motion to dismiss the indictment, the district court considered evidence that "went outside the indictment," and as a consequence jeopardy attached. They then argue that the government's present appeal is improper because any retrial would constitute a violation of the Double Jeopardy Clause. We disagree.

The government's indictment was dismissed pursuant to a pretrial motion made by the Defendants. Defendants were "not then, nor [have they] ever been, 'put to trial before the trier of facts.' " *Serfass v. United States*, 420 U.S. 377, 389 (1975). "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Id.* at 391-92. As in *Serfass*, "[a]t no time during or following the hearing on [Defendants'] motion to dismiss the indictment did the district court have jurisdiction to do more than grant or deny that motion, and neither before nor after the ruling did jeopardy attach." *Id.* at 389.

In a nonjury trial, jeopardy does not attach until the court begins to hear evidence from which a factual determination of guilt or innocence can be made. *See id.* at 388; *United States v. Olson*, 751 F.2d 1126, 1128 (9th Cir. 1985) (per curiam). Defendants contend that the district court did hear evidence, for example, videotaped depositions that they argue were submitted to the court. *See* Aplee. Marchese Br. at 4. The government responds that the court heard evidence only in connection with the pretrial motion to dismiss and disputes that any depositions, videotapes, or transcripts were ever presented to court. *See* Aplt.

Reply Br. at 3. In order to determine whether or not this appeal is proper under 18 U.S.C. § 3731, we need not resolve this factual disagreement.

For the court's dismissal to function as the equivalent of an acquittal, the judge would need to have considered evidence that would constitute a defense on the merits. *See United States v. Brewster*, 408 U.S. 501, 506 (1971). In assessing the sufficiency of the government's indictment, the court heard evidence regarding the government's ability to trace Mr. Nemelka's kickbacks from Power's customers. Since we find in this opinion that tracing is not a requisite to establishing a case of mail fraud, the evidence surrounding this issue would not constitute a defense on the merits. Hence, the court's dismissal did not act as the functional equivalent of an acquittal.

Furthermore, the trial had not commenced, literally or constructively. It is clear from the record that anything the court considered was only in connection with Defendants' pretrial motion to dismiss the indictment. Counsels' arguments on this motion did not constitute the presentation of evidence for the purpose of determining guilt or innocence, which is "the essence of the attachment of jeopardy." *Olson*, 751 F.2d at 1128. Hence, jeopardy did not attach, and this appeal is appropriately before us.

B. Dismissal of the Indictment

The district court determined that the government was attempting to prosecute this case on the basis of a constructive trust theory, alleging that Defendants defrauded Power's customers of their right to honest and faithful brokers. Because this Circuit expressly rejected the constructive trust theory of prosecution in *United States v. Shelton*, 848 F.2d 1485, 1491-92

(10th Cir. 1988), the district court dismissed the indictment as insufficient. The sufficiency of the indictment is a question of law we review de novo. *United States v. Brady*, 13 F.3d 334, 338 (10th Cir. 1993); *United States v. Levine*, 970 F.2d 681, 685 (10th Cir.), *cert. denied*, 113 S. Ct. 289 (1992).

Title 18 U.S.C. § 1341 permits prosecution of whoever "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . ." utilizes the mail to facilitate such plan or scheme. This statute "clearly protects property rights, but does not refer to the intangible right of the citizenry to good government[,]" or for that matter, to the public's right to honest brokers, absent any transaction involving a property interest, tangible or intangible. *See McNally v. United States*, 483 U.S. 350, 356 (1987); *Carpenter v. United States*, 484 U.S. 19, 25 (1987).

The district court held that the Government must establish a nexus between the money paid by Power's customers and the kickbacks Nemelka paid to Power, in order to satisfy *McNally*. We disagree.

Neither *McNally* nor its progeny hold that such a nexus must exist in order to prove mail fraud under 18 U.S.C. § 1341. These cases merely determined that the mail fraud statute requires the loss of a property interest. Indeed, the *McNally* problem is not present in this case. The government's indictment alleges that Power's customers were deprived of such a property interest when they transferred funds to Power, based upon the brokers' materially false statements and omissions. The fact that the government cannot trace the kickbacks to the particular stock sales involved is legally insignificant, as the ultimate success or

failure of the mail fraud scheme is immaterial. *See United States v. Dunning*, 929 F.2d 579, 581 (10th Cir.), *cert. denied*, 112 S. Ct. 224 (1991).

It should also be noted that pecuniary loss is not a requirement under *McNally*. *See Carpenter*, 484 U.S. at 27; *Dunning*, 929 F.2d at 581. The essence of *McNally* is that one cannot violate 18 U.S.C. § 1341 by infringing upon another's expectation of honest conduct, as opposed to another's property interest. In *McNally*, the government indicted public officials of the Commonwealth of Kentucky for selecting an insurance agency for the state based on the company's willingness to make kickbacks. The government was unable, however, to identify a victim who transferred money or property to the public officials. The Court concluded that the alleged victims of the scheme, the citizens of Kentucky, were not defrauded of any cognizable property interest. Indeed, the Court stated in *McNally*

> that as the action comes to us, there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance.

McNally, 483 U.S. at 360. Hence, the Court found the government's indictment to be insufficient under 18 U.S.C. § 1341.

Unlike the citizens of Kentucky, Power's customers may not have invested in the stocks controlled by Mr. Nemelka, absent the Defendants' enticements. This factual scenario is distinct from

the "honest government cases," such as *McNally* and *United States v. Holzer*, where the victims may have been the general public and the prosecution did not show the loss of any discrete property interest as a result of the scheme. *See United States v. Holzer*, 840 F.2d 1343, 1348 (7th Cir.) (where a judge accepted bribes, citizens were deprived only of the intangible right to fair administration of justice because there was no evidence that the citizens lost any money or property), *cert. denied*, 486 U.S. 1035 (1988). Here, the customers invested on the strength of Power's recommendations. The fact that the government concedes that it cannot trace the funds paid by Power's customers for the securities back through to the Defendant does not fatally flaw the indictment.

REVERSED.

APPENDIX B — DISTRICT COURT'S ORDER - FILED MARCH 21, 1994 (UNPUBLISHED)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Criminal Action No. 93-CR-8

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD T. MARCHESE, OLIVER LEROY SANDBERG, DAVID R. NEMELKA, and LAURA LEE SORENSON

Defendants.

ORDER

The Defendants move for a clarification of the law of the case and to renew their motion under Fed.R.Crim.P. 12(b) to dismiss the indictment. I held a hearing on this motion on March 17, 1994 and continued on March 21, 1994. For the reasons set forth below, their joint motion will be granted.

In its response to defendants' motion for clarification, the government sets forth its statement of the case: "Power's customers were defrauded of their money when Power induced those customers to send their money to Power to buy stock based on materially false statements and omissions." The government states the overriding issue to be: "whether the money which Power's customers paid for their stock as a result of the alleged

fraud is a sufficient property interest to sustain the government's burden that a property right of Power's customers was taken or placed at risk under *McNally*." The government then argues that to convict the defendants for the mail fraud counts under 18 U.S.C. § 1341, it need not prove loss to Power's customers or proof of some particular use of the customer's money by the defendants. I agree with the government's statement of the pivotal issue. However, I disagree with its argument and answer the question in the negative.

The Supreme Court, in *McNally*, held that a scheme defrauding state citizens of their intangible rights to honest and impartial government did not constitute mail fraud under 18 U.S.C. § 1341. *McNally*, 483 U.S. at 356-57. The *McNally* Court noted, however, that the mail fraud statute clearly protects property rights. *Id.* at 356. In *Carpenter v. U.S.*, 484 U.S. 19 (1987), the Supreme Court clarified McNally by upholding a mail fraud conviction, recognizing that confidential business information — an intangible interest — constituted property, and, therefore, came within the statute's purview. *Carpenter*, 484 U.S. at 28. The Court declared: "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Id.* at 25.

To sustain the mail fraud charges here, the indictment must allege more than the defrauding of Power's customers of their right to honest and faithful brokers, an interest too ethereal in itself to fall within the protection of the mail fraud statute, which "had its origin in the desire to protect individual property rights." *Carpenter*, 484 U.S. at 25 (quoting *McNally*, 483 U.S. at 359 n.8). As the government postures it case, the indictment does not survive the defendants' challenge under *McNally* and its progeny because the government's case is based on a constructive trust

theory which was held to be insufficient to uphold mail fraud charges in *U.S. v. Shelton*, 848 F.2d 1485 (10th Cir. 1988). *See also U.S. v. Levine*, 750 F.Supp. 1433 (D.Colo. 1990); *U.S. v. Ochs*, 842 F.2d 515 (1st Cir. 1988).

The *McNally* holding and its progeny apply here. The indictment is therefore insufficient because it does not contain all of the elements necessary to sustain the mail fraud charges against the defendants. Since the money laundering counts stem from the predicate mail fraud charges in counts 1-18, those charges will also be dismissed. Accordingly, the defendants' joint motion to dismiss the indictment will be granted.

Accordingly, IT IS ORDERED that

(1) the defendants' joint motion to dismiss the indictment under Fed.R.Crim.P. 12(b) is granted.

Dated: March 21, 1994 in Denver, Colorado.

BY THE COURT:

s/ Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 93-CR-8

Certificate of Mailing

A copy of this order was sent on March 21, 1994 to the following:

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Federal Pretrial Services
Federal Probation Department
U.S. Marshal Service

s/ illegible
Deputy Clerk

APPENDIX C — DISTRICT COURT'S ORDER DATED DECEMBER 7, 1993 (838 F. SUPP. 1424)

UNITED STATES of America,

Plaintiff,

v.

Richard T. MARCHESE, Orville Leroy Sandberg, David R. Nemelka and Laura Lee Sorenson,

Defendants.

Crim. A. No. 93-CR-008.

United States District Court,
D. Colorado.

Dec. 7, 1993.

* * *

Kenneth Buck, Gerald Rafferty, Asst. U.S. Attys., Denver, CO, for U.S.

Joseph Saint-Veltri, Leonard Davies, Denver, CO, for Marchese.

John H. Schlie, Cross, Schlie and Heckenbach, Englewood, CO, for Sandberg.

Steven L. Waters, Martha Bohling, Robinson, Waters, O'Dorisio and Rapson, P.C., Denver, CO, for Nemelka.

David Kaplan, Pozner, Hutt & Kaplan, Denver, CO, Loren E.

Appendix C

Weiss, Purser Okazaki & Berrett, Salt Lake City, UT, for Sorenson.

MEMORANDUM OPINION AND ORDER

BABCOCK, District Judge.

Defendants Richard T. Marchese (Marchese), Orville Leroy Sandberg (Sandberg), David R. Nemelka (Nemelka) and Laura Lee Sorenson (Sorenson) move to dismiss the indictment. These motions are adequately briefed and oral argument was held December 3, 1993. For all the reasons set forth below, defendants' motions will be denied.

The indictment charges Nemelka, Sandberg, and Marchese with mail fraud and money laundering. Sorenson is charged with mail fraud. Mail fraud, under 18 U.S.C. § 1341, prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense or promises".

The defendants contend that the indictment should be dismissed pursuant to *McNally v. U.S.*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) and Fed.R.Crim.P. 12(b)(2). They argue that the mail fraud scheme is charged on the theory that the defendants deprived Power Securities' (Power) customers of their right to honest and faithful service and, thus, the mail fraud charges are insufficient under *McNally* and must be dismissed.

The government contends that its theory of this case, as set forth in the indictment, is that Nemelka paid kickbacks from the sale of the controlled securities to Marchese and Sandberg. The government further contends that these kickbacks violated Marchese's and Sandberg's fiduciary duty to Power's customers

and that these acts are attributable to Nemelka and Sorenson because they were co-schemers. Based on the government's theory of the case, the indictment is sufficient to withstand the defendants' motions to dismiss.

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against him which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. U.S.*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *U.S. v. Mobile Materials, Inc.*, 871 F.2d 902, 906 (10th Cir.1989). Thus, the focus of my inquiry here is whether under the government's theory the mail fraud charges are sustainable because a property right of Power's customers was taken or placed at risk as a result of the alleged fraudulent scheme. If no property right was involved, the mail fraud charges cannot survive.

The Supreme Court, in *McNally,* held that a scheme defrauding state citizens of their intangible rights to honest and impartial government did not constitute mail fraud under 18 U.S.C. § 1341. *McNally,* 483 U.S. at 356-57, 107 S.Ct. at 2879-80. The *McNally* Court noted, however, that the mail fraud statute clearly protects property rights. *Id.* at 356, 107 S.Ct. at 2879-80. In *Carpenter v. U.S.*, 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), the Supreme Court clarified McNally by upholding a mail fraud conviction, recognizing that confidential business information—an intangible interest—constituted property and, therefore, came within the statute's purview. *Carpenter,* 484 U.S. at 28, 108 S.Ct. at 322. The Court declared: "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Id.* at 25, 108 S.Ct. at 320.

Later cases construing *Carpenter* hold that shareholders have property interests. *See, e.g., U.S. v. Wallach,* 935 F.2d 445, 462 (2d Cir.1991). The purchase and sale of stock involves a property interest. *Id.* Furthermore, the deprivation of economically material information, such as kickbacks, implicates a property interest and can provide the basis for a mail fraud prosecution. *See generally, Id.* at 463; *U.S. v. Richerson,* 833 F.2d 1147, 1156-57 (5th Cir.1987). Thus, to sustain the mail fraud charges here, the indictment must allege that the funds for the kickbacks came from or was intended to come from the purchase or sale of securities to Power's customers. *See generally, U.S. v. Levine,* 750 F.Supp. 1433 (D.Colo.1990).

Although the Tenth Circuit has not yet addressed the application of the mail fraud statute to those receiving kickbacks from the sale of stock, the Second Circuit, in a *pre-McNally* case, held that the mail fraud statute is violated when "a fiduciary fails to disclose material information which he is under a duty to disclose under circumstances where the non-disclosure could or does result in harm to another." *U.S. v. Weiss,* 752 F.2d 777, 784 (2nd Cir.), *cert. denied,* 474 U.S. 944, 106 S.Ct. 308, 88 L.Ed.2d 285 (1985); *accord U.S. v. Dial,* 757 F.2d 163, 168 (7th Cir.), *cert. denied,* 474 U.S. 838, 106 S.Ct. 116, 88 L.Ed.2d 95 (1985).

In this case, the indictment alleges, among other things, that the defendants devised a scheme to defraud Power's customers of their money and property. Indictment, ¶¶1, 19, and 24. It alleges that Power's customers were induced to become customers when told they would come first, and that Power would not make money at their expense. Indictment, ¶24. The indictment further alleges that the defendants:

> engaged in an unlawful scheme to defraud

> Power's customers of their money and property by inducing those customers to purchase and sell penny stocks through the use of materially false or misleading statements or omissions . . . [and] the defendants failed to disclose that Nemelka secretly controlled those stocks and Nemelka was paying kickbacks to Marchese, Sandberg and others to retail Nemelka-controlled securities. Indictment, ¶19.

At ¶25, the indictment states:

> As part of said scheme, Marchese, Sandberg and others acting at the defendants' direction instructed the brokers at Power to recommend the purchase and sale of securities which were secretly controlled by Nemelka. . . . As consideration for Power purchasing and selling Nemelka-controlled securities, Nemelka agreed to secretly pay Marchese, Sandberg, . . . kickbacks from the sale of the securities . . .

Here, the mail fraud charges survive the defendants' challenge under *McNally* because a property right, the purchase and sale of stock by Power's customers, was placed at risk by the alleged fraudulent scheme. Furthermore, the kickbacks, which Nemelka allegedly paid to Marchese and Sandberg, came from the sale of securities to Power's customers. In addition, Marchese and Sandberg, as Power's co-owners and directors, had a fiduciary responsibility to disclose material information (the alleged kickbacks) to their customers. The failure to make such disclosure, assuming it was material, further supports the

alleged mail fraud violation. *See generally, Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 153, 92 S.Ct. 1456, 1472, 31 L.Ed.2d 741 (1972); *cf. Hudson v. Wilhelm*, 651 F.Supp. 1062, 1066 (D.Colo.1987) (a broker is a fiduciary); *Paine, Webber, Jackson & Curtis Inc. v. Adams*, 718 P.2d 508, 515 (Colo.1986)(a stockbroker has a duty to serve a customer's financial interest).

Defendants Nemelka and Sorenson further challenge the indictment's sufficiency on the grounds that it fails to assert that they made any false representations to Power's customers, the center of the alleged scheme to defraud. This argument fails because Nemelka and Sorenson are accountable for all acts of their alleged co-schemers in furtherance of the scheme. Conspiracy doctrines apply to multi-member mail fraud schemes even if the indictment does not formally charge conspiracy. *U.S. v. Wormick*, 709 F.2d 454, 461 (7th Cir.1983). Once a defendant is implicated in a scheme, he is liable for all the acts of his co-schemers. *U.S. v. Funt*, 896 F.2d 1288, 1294 (11th Cir.1990); *see also Wormick*, 709 F.2d at 461 (once defendant becomes a party to the scheme, he is accountable for mailings caused by other members, whether or not he knew of or agreed to any specific mailing).

Here, the indictment alleges that Nemelka and Sorenson were involved in a scheme to defraud Power's customers. Indictment ¶19. Therefore, Nemelka and Sorenson are accountable for all acts of their alleged co-schemers in furtherance of the scheme. Since the alleged scheme includes Marchese and Sandberg inducing Power's customers to purchase and sell stocks as a result of materially false or misleading statement or omissions, such acts are attributable to Nemelka and Sorenson.

Appendix C

Because the *McNally* holding is inapplicable here and because the acts of Marchese and Sandberg are attributable to Nemelka and Sorenson, the indictment sufficiently contains all of the elements necessary to sustain the charges against the defendants. Furthermore, the indictment fairly and adequately informs the defendants of the charges for which they must defend and guards against any double jeopardy risk. Accordingly, their motions to dismiss the indictment will be denied.

Defendant Marchese independently argues that the indictment fails to state a crime under Fed.R.Crim.P. 7(c)(1) and, thus, it must be dismissed. Marchese first contends that the indictment is defective because it fails to allege that he or his company was legally bound to disclose the fact that he was receiving kickbacks from the sales of securities. The indictment alleges that Marchese was the owner and director of Power Securities; that the defendants engaged in an unlawful scheme to defraud Power's customers of money and property by inducing them to purchase and sell stocks through materially false or misleading statements; that the false statements concerned brokers selling certain stocks to Power's customers while assuring them that Power had their best interests in mind; and that Nemelka agreed to secretly pay Marchese kickbacks from the sale of the securities. Indictment ¶¶2, 19, 24, and 25.

In light of these allegations, the indictment sufficiently alleges all of the elements of mail fraud necessary to sustain the indictment. The indictment need not specifically allege that Marchese breached his fiduciary duty to his customers. Moreover, the legal obligation to disclose such kickbacks to his customers is implied. Furthermore, Marchese's argument rests, at least in part, on factual questions which must be determined by

the trier of fact and which are inappropriate to support a motion to dismiss i.e. whether Marchese and Sandberg breached their fiduciary duty to Power's customers and whether the kickbacks constituted material information such that Marchese and Sandberg had a duty to disclose this information.

Marchese also argues that the indictment is defective because it fails to allege that his customers were injured by his receipt of "undisclosed fees". This argument lacks merit because a victim's actual loss as a result of a scheme is not an essential mail fraud element. *U.S. v. Stewart,* 872 F.2d 957, 960-61 (10th Cir.1989). Moreover, the indictment alleges that the kickbacks came from the sale of the securities. Indictment ¶25. Marchese further contends that the indictment fails to allege that the payment of "fees" were inimical to his customer's interests. In light of other allegations in the indictment, this argument fails as well.

Marchese final argument is that the indictment is insufficient because it merely tracks statutory language without alleging particular elements of an offense. This argument is similarly without merit. Read as a whole, the indictment alleges each of the elements of mail fraud and sets forth the mail fraud scheme in sufficient detail. Indictment, ¶¶ 2, 19, 24, 25 and 39.

Marchese's challenge to the sufficiency of the money laundering charges also fails. In *U.S. v. Alford,* 999 F.2d 818 (5th Cir.1993), as in this case, the court upheld an indictment where it tracked the language of the money laundering statute, identified the specified unlawful activity as mail and wire fraud, and described specific financial transactions associated with each count. *Id.* at 822-23. because the indictment here contains similar detail, Marchese's motion to dismiss the indictment will be denied.

Appendix C

Accordingly, IT IS ORDERED THAT the defendants' motions to dismiss the indictment are DENIED.

APPENDIX D — TENTH CIRCUIT ORDER ON REHEARING DATED MARCH 17, 1994

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-1149

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

RICHARD T. MARCHESE, LAURA LEE SORENSON, ORVILLE LEROY SANDBERG, DAVID R. NEMELKA,

Defendants - Appellees.

ORDER
Entered March 8, 1995

Before KELLY and HENRY, Circuit Judges, and BURCIAGA*, District Judge.

This matter comes on for consideration of appellee Marchese's and appellee Nemelka's motions to adopt and join appellee Sandberg's petition for rehearing with suggestion for rehearing in banc.

Upon consideration thereof, the motions are granted.

Additionally, this matter comes on for consideration of the

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* Honorable Juan G. Burciaga, Senior District Judge, United States District Court for the District of New Mexico, sitting by designation.

Appendix D

appellees' petition for rehearing with suggestion for rehearing in banc.

Upon consideration thereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Appellee Nemelka's motion to stay issuance of the mandate is hereby denied.

Judge Burciaga voted on March 2, 1995.

Entered for the Court

PATRICK FISHER, Clerk

By: s/ Audrey F. Weigel
Audrey F. Weigel
Deputy Clerk

APPENDIX E — TRANSCRIPT OF HEARING DATED MARCH 17, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

93-CR-8-B

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD T. MARCHESE, ORVILLE LEROY SANDBERG, DAVID R. NEMELKA, and LAURA LEE SORENSON,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
FURTHER ARGUMENT RE DEFENDANTS' MOTION
FOR CLARIFICATION OF THE LAW OF THE CASE

Before the HONORABLE LEWIS T. BABCOCK, Judge, United States District Court for the District of Colorado, commencing at 10:00 a.m. on the 17th day of March, 1994, in Courtroom C-204, United States Courthouse, Denver, Colorado.

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Appendix E

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(Defendants present.)

Appendix E

PROCEEDINGS

THE COURT: Please be seated. I've scheduled further argument on the motion of defendants for clarification of the law of the case that has to this point been set out in my order denying the motion to dismiss the indictment, finding that it is facially sufficient.

I since took some argument on that last week and set it over for further argument today. The government has filed a response, and with some supplementation.

I'll go ahead and take further argument from the defense.

MR. SCHLIE: Thank you, your Honor. I would welcome the opportunity to give our opinions on any questions that the Court may have as it goes through its analysis that differs from the general tenor at which we left last Friday.

Let me say that we have reviewed the new cases cited by the government, and the new cases do not address the point that we have brought to the Court's attention anymore than the last cases they cited.

Shelton and *McNally* and the other cases in the Tenth Circuit make it clear that there must be a connection between the alleged victim and the alleged fraud, and that's what the government has admitted that they can't prove here. Whether the government cites *Ashman* or any of the other cases they've cited, even *Simpson* that they cited as recently as last evening, those cases were able to identify the victim.

In *Simpson* it was the bank. The bank's funds were used for — by Mr. Simpson in the fraudulent scheme.

Appendix E

In *Ashman* there was a contract that was matched, and the example given in the case between a person by the name of Egham and a person by the name of Snyder.

Now what the government is saying in an *Ashman* type of approach, or analogy, if you will, is that we don't have to prove that the contract was one that was matched, we just have to prove that it was a soybean futures contract, period.

Now even *Ashman* draws the distinction, because it dismisses six counts of that indictment where those matched trades occurred on what I believe they call limitation days when there was not any opportunity for the customer behind that futures contract to lose any money. And the Court dismissed those cases.

And that's exactly the situation that we have here. This is a threshold issue. It is the issue that the Court assumed, I would submit, was there when it ruled on December 7th, and has only later learned that in fact it is not there.

Mail fraud requires this nexus or connection. It's there in *Shelton*, it's there in *Levine*, and those are the basis for those cases.

Your Honor, we stand on those cases, and we would welcome any opportunity for further questioning on them. I don't know what we can say further.

THE COURT: Mr. Waters?

MR. WATERS: Nothing, your Honor. I will rely on the argument of Mr. Schlie.

Appendix E

THE COURT: Mr. Davies?

MR. DAVIES: Thank you, your Honor. Good morning. Your Honor, I understand that yesterday — last time we met here, when we left the Court had asked or indicated a desire for it, and I suppose by extension, us to go back to those cases you set forth, *McNally, Carpenter, Shelton,* I think *Levine*. I won't mention — I won't address myself to *Levine*, except to note that this Court wrote *Levine,* and I suppose that the Court is more familiar with what it would — it would be presumptuous of me to try and suggest what the Court may have meant when it ruled in *Levine*.

Frankly, your Honor — and, frankly, I have done that again and juxtaposed these cases against what I understand the situation to be. As I understand, the Court had some concern about the question (a) was there property contemplated by *McNally* in this case, and if there is, is it the property of the particular people alleged in counts 1 through 18 of the indictment, and therefore — or the next question then, would there be a requirement of proof that these people specifically lost a property interest or were — and lost it as a result of an agreement by Mr. Nemelka to make payments to Mr. Marchese, for instance.

My understanding is that the government has indicated that they do not believe that they have to show that there was a specific nexus between any monetary loss — they don't even have to show a pecuniary loss, your Honor, and I agree with that, I don't think that that's the gravamen of the offense is to actually show a loss, it is the attempt to obtain the money or the property.

The problem that I have, just as a little bit of background for the Court, is — and why the clarification I think is somewhat

necessary, is that frankly part of my analysis of the case was that a — we would be defending against whether or not a particular person named in the indictment, in the counts of the indictment had received this stock by way of Mr. Nemelka, directly to Mr. Marchese, directly to them, or whether this was stock that had come from other sources. There was other stock out there, all the stock didn't come from them. Whether it had been sold to the one person, sold back into the company, sold to another person, sold back into the company, and then sold to that person. In effect, how were they — I mean that they were in fact a victim of a scheme, rather than just a global notion that there was a scheme in some ethereal sense, and that these persons bought that stock, whether it was bought under that scheme or from some other source or not.

So that's the framework within which I have assumed the Court wanted us to address these preliminary issues, apart from the question of fiduciary duty that the Court indicated I think in response to my argument last time that that was a matter of fact to be determined in the case.

I should and do wish to point out to the Court that I think that the government continues to assume in its argument that there is a legal — as a matter of law a fiduciary duty here, and to the extent in their documents they say they violated this fiduciary duty or that fiduciary duty, and it strikes me that they are in fact arguing that — and they can address this, if the Court's even interested.

But I think they are taking a position that they are going not upon a set of facts to establish a fiduciary duty between one of these 18 and Powers, but rather are suggesting that there is a fiduciary duty *ipso facto* between a broker and his customer in any sense, just by virtue of that relationship.

And we submit, your Honor, that I don't think there's any law to support that position. A financial adviser doesn't — these aren't financial advisers. I admit that while the Court has visited these issues in other cases, and that is a fiduciary duty, there has to be some relationship between the parties, there has to be an acceptance of a relationship, there has to be a position of the relationship, there has to be some negotiation of a relationship. And a financial adviser I think takes that position, and I understand that argument. But just a person selling stocks, making cold calls to people, "do you want to buy this stock," does that establish a fiduciary duty? I think that is what the government is asking for this Court to establish at some point, is that as a matter of law there is a fiduciary duty between a stockbroker and his customer.

The question then, your Honor — my problem in the situation is that I don't know what the property right was that *McNally* requires. I admit it can be tangible, it can be intangible. In the days of Blackstone, I think he referred to it as corporeal or incorporeal. And I understand that there's a requirement that — it doesn't have to be something you can touch, taste, smell or feel, it can be this right, for instance, in *Carpenter* to the right to have confidential — develop and maintain confidential information. But there has to be some identifying aspect of it, it seems to me, to be intangible property.

And I think that's what the courts addressed itself to when it said — I think all the courts, including the Tenth Circuit in Shelton, when it adopted Ochs — the Ochs and Holzer rationale, that there has to be some property that — identifiable property, whether tangible or intangible, that the victim had at risk. Not that it was successful, not that there was money made, but that it was at risk, and it can't be some ethereal property which extends the

boundaries of this mail fraud beyond the ability of a person who is involved in commerce from recognizing. It has to be specific. It can't be based on guesswork. It has to have some fundamental aspect to it that I don't find, I don't understand is in this case, your Honor. I just don't see it.

I think that what they are saying is that the customers of Powers had a intangible property interest in knowing exactly how much Powers was paying for their stock, where if they made a profit, where that profit was going or how it was going.

Apparently that's the — that's the property interest. And it arises from what? From a, according to the government, a fiduciary duty that exists in the law between Powers — between a stockbroker and a customer.

Now if in fact they are saying a customer, a specific customer named in these 18 counts, had a specific property interest to know that the stock they were buying came from Mr. Nemelka, and that in exchange for all of that, that money was going — some money was being divided or some payments were being made, seems to me there would have to be a showing that the difference — knowing that information, for instance in the case of a judge being bribed, that the citizens knowing that information, that would somehow make a difference.

They were buying at arm's length on the market. It was within the market, their quotation and so forth and so on. So if we're going to say they don't have to show that these individuals were in fact victims and had some property at stake that they could have lost or not lost, and that they were potentially at harm because of the existence of that information — not because of the existence of the information, but because of the failure to disclose

that information, then I don't know what the defendant has an opportunity to defend against.

Wouldn't jeopardy attach — if the theory of the government is right, wouldn't jeopardy even after trial attach or would they just bring in another 15 people, 18 people?

THE COURT: No, I think they are saying that there are 20,800 customers. That's what you are defending against.

MR. DAVIES: But do they not have to —

THE COURT: Power customers globally.

MR. DAVIES: Of these stocks.

THE COURT: Sure. Of Miller, 4000, Genexus 7700, AST 5800, and Westwind 3300, and they picked 18 mailings out of those 20,800. But basically you're defending against the global scheme. That's what I take the government's theory to be.

MR. DAVIES: All right. Well, if those 18 —

THE COURT: How are you going to do that?

MR. DAVIES: Huh?

THE COURT: How are you going to do that?

MR. DAVIES: How am I going to do what, your Honor?

THE COURT: Defend against that global scheme?

MR. DAVIES: I don't know how — that's the point I am making, your Honor. Do we prove that every one of these 20,000 people — I just don't know, your Honor.

THE COURT: Well, as I understand —

MR. DAVIES: Those 20,000 people and that whole notion, your Honor, strikes me as —

THE COURT: As I understand the allegations, they have — these 20,800 people have placed approximately, and I am rounding, 58', $59 million at risk by investing in Miller, Genexus, AST and Westwind, and it was not disclosed to that investing universe that there were kickbacks paid from Nemelka to Mr. Marchese and Mr. Sandberg in the sum of $3,064.895. Now that's what the indictment is charging. Don't you understand that?

That's the government's theory here. We'll see if I understand it correctly. And Mr. Nemelka put together these — control of these corporations, jammed them through Mr. Marchese and Mr. Sandberg's brokerage house and got kickbacks in the amount of $3,064,000. Never told anybody that Mr. Nemelka was the power behind the throne running this stock through the market or paying these kickbacks to Mr. Marchese and Mr. Sandberg.

Now that, as I understand it, is this case in a nutshell. And I'll be corrected if I'm wrong.

MR. DAVIES: And that the victims in this case were those people who bought that — I suppose Nemelka stock.

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THE COURT: Well, 20,800 investors alleged in certain paragraphs of the indictment. Now there are 18 mailings, counts 1 through 18, 18 mailings made in furtherance of this scheme. They could have picked any one of the 20,800, I suppose, but there are 18 mailings.

MR. DAVIES: I understand that, your Honor. I think that's —

THE COURT: I think that's what the government's theory is.

MR. DAVIES: And that those 18 —

THE COURT: Mr. Schlie, just take it easy.

MR. SCHLIE: I am questioning whether the Court is making rhetorical questions here to Mr. Davies or —

THE COURT: I am trying — it is sort of a rhetorical question to Mr. Davies, and it's going to be a rhetorical question to the government. I take that as the government's theory. I am going to get to that in due course here.

And the property interest, apart from having halfway coughed up a case on saying that they are entitled to honest service by Power, which is an honesty and service sort of thing that *McNally* said is not viable, they say that they look to *Ashman*, and they say, well, gee, when these 20,800 customers invested approximately 58 million to $59 million under these circumstances induced by the fraud, they placed that $58 million at risk. And that's the property interest.

And the fiduciary relationship — or the fiduciary duty arises out of the broker's obligation to, if buying, buy as low as possible, and if selling, sell as high as possible. And in fact their customers have anything they need to know. And it doesn't matter where the kickbacks came from, just so they're pegged in some fashion to a percentage of the sales of stock of Mr. Nemelka:

Now that's the way I understand the government's theory. And if that is a rhetorical question that Mr. Schlie wants to address, I'll take response to it.

MR. SCHLIE: Thank you, your Honor. What the Court is describing in this situation, as the government is saying they cannot prove up this nexus, the only way they can show it is by means of a constructive trust theory. That is the essence of a constructive trust, when they can't show that connection. And the Tenth Circuit has expressly stated and rejected the constructive trust theory. That's the problem with this case.

Before we get into fiduciary duties, before we get into — you know, all the issues, your Honor, that — and the distinctions between *Ashman* and the commodities market and the Seventh Circuit and the Tenth Circuit case law, you know, which we're not waiving by this argument, you know, what we're saying is that we don't even get there yet.

The government has admitted that they can't draw a connection between these 18 people listed in the indictment and the supposed fraud that — or scheme to defraud that allegedly occurred. And that is the problem here.

The only way they get to it — the only way they can get to it is through a constructive trust theory. And this isn't just a

question that they can't prove it up. In most of these cases, your Honor, you know, it's clear that the stock came from other places other than Mr. Nemelka and had absolutely nothing to do with —

THE COURT: Well, it's the puppeteer theory. I mean if he is the puppeteer, the master puppeteer, and he is controlling the strings and routing this stock around under his control, it doesn't matter.

MR. SCHLIE: Well, your Honor, that's part of the problem with the factual basis that will become clear at trial, because those are not the facts of this case, and those are not going to be the facts of this case.

There are a number of different stock brokerage firms that were making markets in the stock, and this stock was all over the board through the numerous places and numerous individuals, and many owners by the time it finally got to — it got to the 18 that are listed in this indictment.

I mean the problem is that they can't tie those 18 to a property right without a constructive trust theory being utilized.

THE COURT: And they say they don't have to.

MR. SCHLIE: The Tenth Circuit says they do.

THE COURT: Mr. Waters.

MR. WATERS: Your Honor, very, very briefly. I certainly don't want to belabor the point, but I think the government is going beyond the fact that they don't have to tie it to the 18. What the government is saying is that the principles of *McNally,* and I'm reading from their brief, are inapplicable to the instant case.

And I'm sorry, that's just not true. They then go on to define the issue as whether a sufficient property interest to sustain the government's burden was taken or placed at risk under *McNally*. So on the one hand *McNally* doesn't apply, on the other hand that's the issue.

What the government is saying is they need not show any nexus between any investor, any customer of Power, not the 18. That's where they change their argument dramatically in their last brief. That's where they say they are not subject to the precepts of *McNally, Shelton, Ochs* and *Levine*, and that's where they are wrong. That is the distinction, your Honor, that they do have to show that nexus, and they have not gotten outside the confines of those cases.

In reading their latest brief, your Honor, I guess the only way I could summarize it would be to take this Court's order of December 7th wherein this Court stated, "In order to sustain mail charges here, the indictment must allege that the funds for the kickbacks came from or were intended to come from the purchase or sale of securities to Power's customers."

THE COURT: Well, now I am concerned about that language taken in a vacuum. It says, "Furthermore, kickbacks which Nemelka allegedly paid to Marchese and Sandberg came from the sale of securities to Power's customers." The governments theory as presented, as I understand it, this is not a pure kickback case, and if it were a pure kickback case, it would be much simpler to analyze this case.

MR. WATERS: Allow me to address that, your Honor, because it was a pure kickback case. In the indictment it is a pure kickback case, in the statements that the government has made before this Court, where they indicated just last Friday that they

would show the money that came to Norton Weiner and Dansco would be shown to be used to pay the kickback to Mr. Power — that's what they said.

And what is happening here, your Honor, is that we are trying a case under 15(b) of the Federal Rules of Civil Procedure. And if they think that we are impliedly going to try this case so they can amend their information, they're wrong. This is an indictment, your Honor, and they have changed their position so dramatically. And I can pick out language where they have said in the indictment that the — from the indictment itself that the scheme to defraud Power's customers of their money and property. And now all of a sudden —

THE COURT: That's right, Power's customers. They say the scheme is to defraud Power's customers, 20,800, roughly, of their money and property, i.e., they're paying their shekels to buy this stock, by inducing those investments, i.e., paying their shekels to buy that stock through the use of materially false or misleading statements or omissions, that is falsely representing that Power was acting in the best interest of their customers, and they have to be tied to that brochure, by recommending the purchase and sale of certain publicly traded stocks, and not disclosing that Nemelka controlled the stocks and was paying kickbacks.

Now that — I mean that's what they say. Now the reason why this indictment is facially sufficient is for the same reason that the indictment was facially sufficient in *Shelton* facet of the case in the Tenth Circuit. Now the other guy in that case — the indictment did not allege deprivation of money or property. Here, as with Shelton's indictment in that case, it does. I mean they — it's facially — it is purely facially sufficient.

But I mean that's not the issue now. The issue now is given the government's concession that they will not prove that the funds for the kickbacks from Nemelka to Marchese and Sandberg came from the sale of securities to any Power customer is tantamount to a concession for judgment of acquittal after opening statement. That's where we are.

MR. WATERS: Thank you, your Honor.

THE COURT: Now Mr. Schlie, you've indicated that — and I'm somewhat concerned that your argument is based upon what may be a broader concession than the government has actually made, because the concession that the government has made is the nexus between kickbacks and Power's customers, and that's narrower than sayinq there is no nexus between Power's customers and Power's investments here. See what I mean?

MR. SCHLIE: Not in terms of property right, your Honor.

THE COURT: So then you're back — you're back to your argument that if we're talking purely about the global investments by Power's customers, it's a constructive trust.

MR. SCHLIE: Yes, as to these 18, with their admissions.

THE COURT: Mr. Kaplan.

MR. KAPLAN: Nothing further, your Honor.

THE COURT: Who's going to argue for the government? Mr. Buck. Do I understand your case correctly?

MR. BUCK: Yes, your Honor.

THE COURT: Good.

MR. BUCK: Your Honor, I think the distinction here is between the deprivation of property and showing an actual loss to the 18 customers. We can't say that Evelyn Kautzer paid 10 cents when she should have paid nine cents. There's just too much paper, and it's just too complex to try to prove that. But she paid 10 cents. She was deprived of her property, and that's what the government will prove.

And the government will prove that as a result of Power buying stock from Mr. Nemelka and selling that stock to its customers, Mr. Nemelka paid — let me say that again. As a result of Power buying stock from Mr. Nemelka, Mr. Nemelka paid kickbacks to Power. Power then went and sold that stock to its customers. Power did not tell those customers that Mr. Nemelka had a control position, which Power knew — and I am specifically speaking now of Mr. Marchese and Mr. Sanderg when I say "Power" — that Mr. Nemelka had a control position and that Mr. Nemelka was paying kickbacks.

And that's the false inducement in this case, your Honor. They gave up that dime after being — after receiving material misrepresentations and omissions.

THE COURT: Well, you indicated that you thought I understood your theory of your case, and it sounds to me as though it is a global theory of fraud. That is that a universe of 20,800 investors were induced to place at risk some 58' to $59 million by investing in these securities.

MR. BUCK: That's correct.

THE COURT: Which sounds sort of like the compromise or taint of an honest market or an unlevel playing field. What's the difference between that ethereal interest of the universe of the market as a whole and the ethereal universal interest of say the citizens of a municipality or county?

MR. BUCK: Your Honor, the *McNally/Shelton* line of cases deals with citizens' rights to honest government.

THE COURT: Well, what about investors' rights to an honest market?

MR. BUCK: Well, that's not what this case deals with. It deals with a dime that an investor pays, and that's a appropriate right and they have an interest in that property right, Judge. That's the difference. The citizens of Kentucky don't have a dime that they're paying the government for that honest government. That's — if those citizens, those victims paid money, that case in my opinion would have been decided differently. That's what the case is about, is honest government. And you can't prove a fraud like that, because it's just too vague. In this case we've got the specific dollar amount that Power's customers paid to Powers, and they were defrauded. They were defrauded because they received material misrepresentations and didn't receive the material omissions.

THE COURT: Each one of the individuals referenced in the 18 counts are investors?

MR. BUCK: That's correct, your Honor.

THE COURT: Okay. Any rebuttal?

MR. SCHLIE: Your Honor, I would just quote from the *Ochs* opinion, which was one of the underpinnings for *Shelton.* On page 526 of that opinion it says that, "We understand that the Intangible Rights Doctrine has become firmly entrenched in the federal courts and that old habits die hard, but we do not think courts are free simply to recharacterize every breach of fiduciary duty as a financial harm and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front."

I think that sums up our argument succinctly, your Honor.

THE COURT: Mr. Waters.

MR. WATERS: Your Honor, again, I strongly believe the government's reliance is misplaced. The government's theory that Power's customers were deprived of the honest investment advice and would not have invested, is essentially what they would say, had they known, was specifically rejected by *Levine* and this Court, where it stated in Shelton it made no difference had it known of the arrangement between the defendants and the insurance companies, it would never have agreed to provide the company with its business. Likewise here. Although arguably the creditors never would have agreed to the arrangement had they known of the agreement between Lansing and the Levines, this does not make their loss more than intangible. Therefore, the counts fail to allege the elements comprising mail fraud. And I think that's essentially what the government is saying, your Honor.

Thank you, sir.

THE COURT: Well, let's take a recess, fifteen minutes or so.

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(Recess at 10:35 until 10:50; all parties present.)

THE COURT: Well, I have read *McNally*; and I have read *Carpenter*; of course I've read Shelton; I've reread my own opinion in *Levine*; my order in this case; I've read and underlined *Ashman,* which cuts both ways; Ochs, Holzer; *Stewart; Kelley; Dial; Simpson;* and even *Brown,* who was not a lowly district judge, he was a lowly circuit judge.

MR. RAFFERTY: I stand corrected.

THE COURT: Well, I have reread this indictment over and over, and I appreciate the focus that the parties have given to the motion for clarification of the law of the case in your briefs, because it draws the line. I've even read Webster's Third New International definition of "kickback," as well as that of Black's Law dictionary, which derives from Internal Revenue Code 162, 18 U.S.C.A., 74. I've read the pre-*McNally* cases.

And the question has to simply be decided now. Given the government's unqualified concession in this case, it's my view that it is purely a constructive trust situation prohibited by *Shelton, Ochs*. The nexus is crucial, and is concededly absent.

Now I may be dead wrong, and I don't know how else to — you all have been before me a number of times when I have articulated adnauseam length rulings, and I don't know how to articulate this ruling any other way. Absent the nexus, constructive trust as defined by the Tenth Circuit in *Shelton* applies, and the government can't prove its case. It's just that simple. Now I may be dead wrong, and if so I should be corrected and will be by the Tenth Circuit Court of Appeals. But as the case is postured now, I can't call it any other way.

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Now in terms of procedure, the essence of what I have ruled is a rule 29 judgment of acquittal after opening statements. I want to be very cautious about how we posture this procedurally, because it has very important ramifications for the government's interest either via a dismissal without prejudice or judgment of acquittal and the right — well, if it's a judgment of acquittal, I am not sure you have the right to appeal it.

MR. RAFFERTY: We do not, your Honor.

THE COURT: That's right. If it's a dismissal without prejudice, I don't think you have a right to appeal that either. I don't know. You might.

MR. RAFFERTY: I believe we do, your Honor.

THE COURT: I believe you do. I think the question has to be decided by a more — in a more intelligent tribunal, if not *en banc*, of judges. Now I know *Shelton* was *en banc*. *Shelton* is rather emphatic about the constructive trust theory application.

Jeopardy has not yet attached. In essence what I have said is that the government can't prove its case, but I am not sure where that leaves us procedurally.

MR. RAFFERTY: Your Honor, in the first paragraph of our response I believe we said that in essence it is — the motion for clarification should be considered a motion for dismissal of the indictment. If the Court agrees with that, then, as the Court is inclined to do, I think it is procedurally proper to say that it is a dismissal without prejudice for failing to establish a nexus.

THE COURT: I think that's right.

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MR. RAFFERTY: And under 18 U.S.C. 3731, under a criminal case an appeal by the United States shall lie by a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information.

THE COURT: The government should be entitled to appeal this determination. This is not an easy question. The question I think now is clearly defined. It was simply answered, but the paradox is that it's not a simple answer, and it begs consideration by a tribunal or the circuit *en banc,* and that's where it should go.

Mr. Waters.

MR. WATERS: Your Honor, may I just address a couple of issues? And I don't have the answer, because I don't know the procedural ramifications. But certainly, your Honor, in the interest of these defendants, for obvious reasons, jeopardy does attach. We have gone through a long and expensive and protracted battle, five years of investigation. My question is this. Can we accomplish both goals? Can we enter a judgment of acquittal or a rule 29 ruling even if we wait until — even if we start the trial right now, I don't know, could the government still appeal that, although it may not relate to these defendants; but if there's a question of law that needs to be resolved, can it at least, please, your Honor, be resolved independent of five years of investigations and subpoenas and very difficult times for a number of defendants and over 200 people in Utah?

THE COURT: Well, there are 20,800 investors that have an interest here too.

MR. WATERS: That's correct, your Honor.

THE COURT: I am, you know, sympathetic to what you are saying, but the government has a right to have a full determination of its position in this case. *Fong Foo*. I'm not being facetious, F-o-n-g, F-o-o-, 369 U.S. 141, 1962, seems to say that if I enter a judgment of acquittal, jeopardy has attached and the defendants cannot be retried if I make a mistake.

MR. WATERS: May I have the cite again? I am sorry, your Honor.

THE COURT: 369 U.S. 141. And I'm not inclined to — I think — I'll take further argument from the defense, but I think Mr. Rafferty is — this is a very interesting procedural posture, because it is in essence a dismissal of the indictment, of course, but it's based upon a concession, an evidentiary or factual concession made by the government.

That's what led my rationale under rule 29, but I think — you now, I want the government to have its full day in the circuit as well, as it's had up to this point here.

MR. RAFFERTY: Your Honor, if I may, isn't it really based on the motions and the procedural point we are at in the trial? I thought the Court was saying that it is a failure — the indictment is facially defective because it does not allege a nexus between the kickbacks and the customers' property.

THE COURT: I wish I could — you know, I have been struggling with intellectual honesty throughout this case. What I said was that the indictment is facially sufficient, given your concessions, that concession that the evidence cannot establish a nexus, you fall back into the constructive trust prohibition of *Shelton*. That's why it implicates an evidentiary concern.

MR. RAFFERTY: Yes, sir.

THE COURT: Now the reason why I raise this is because it is very — I think it's important that the government have a chance to determine this issue before the circuit. But it's not purely my going back and saying, well, gee, I was in error when I ruled that the indictment was facially sufficient, because what I've said here today during dialogue is that I think it is facially sufficient, as was Mr. Shelton's indictment. But when you factor in the evidentiary concession of what the government cannot prove, the government's case falls, as I see it.

Now I don't know where that leaves you with regard to preserving a right to appeal, because it's a mixed question at this point.

Mr. Kaplan.

MR. KAPLAN: Your Honor, I just would like to add to what Mr. Waters said and to let the Court know that there were discussions among defense counsel as to when we really wanted to raise this issue vis-a-vis jeopardy considerations, and I would just suggest to the Court that in our discussions we felt that it was a threshold issue that needed to be raised rather than going through weeks of testimony when there was, as the Court says —

THE COURT: That's true, and I agree. And I think I know where you're going, but the motion that was postured to me was a motion to clarify the law of the case, and I did. Now you know where the law of the case is. I mean there's a foregone conclusion from that.

MR. KAPLAN: That's why in that context, your Honor, I

guess it would be suggestive of us to say that now we have the ruling of the law on the case, and we'll proceed to trial with that understanding I'm not saying that we're going to actually do that, because it doesn't make much sense to do it, but in terms of a procedural — you know, where we are procedurally, if that's what it is, and we know what we're talking about, we're talking about attaching jeopardy because of the years of having this indictment pending against my client —

THE COURT: Well, that's not going to drive my consideration as to what we do here. I mean I — when you — you asked me a question, and I gave you an answer. Now what are you going to do with it, folks?

MR. DAVIES: Would it be unseemly to maybe ask for a brief recess?

THE COURT: No, it would not be unseemly at all. I mean you indulged me in that respect. Okay. What, 15 minutes?

MR. DAVIES: Thank you, your Honor.

(Recess at 11:05 until 11:20.)

THE COURT: Please be seated. Mr. Davies, you wanted the recess. I thought maybe you would have some revelation.

MR. DAVIES: Your Honor, I don't have any serious revelation. I don't know that we are all of a like mind about the situation. I might say in terms of clarification that it's the position of Mr. Marchese that if the case is in a posture today from the Court's point of view that the indictment — a motion to dismiss the indictment should be granted with respect to Mr. Marchese, we would make that motion.

MR. SCHLIE: Whose turn?

THE COURT: Well, I want to give the government an opportunity to preserve the right of appeal here.

MR. BUCK: Your Honor, we think we preserve that right of appeal through that motion to dismiss the indictment for insufficiency. If the Court were to decide at this point that —

THE COURT: In light of the concessions made, the indictment is insufficient?

MR. BUCK: No, the indictment is insufficient on its face, your Honor. And I can explain our theory to the Court.

THE COURT: Go ahead.

MR. BUCK: Your Honor, in your memorandum opinion on December 7th you said on page 2, first full sentence of page 2, "The government contends that its theory of this case, as set forth in the indictment, is that Nemelka paid kickbacks from the sale of the controlled securities to Marchese and Sandberg." I believe that is the nexus that the Court just referred to earlier.

And on page 3, after citing the *Richardson* case, the Court says, "Thus, to sustain the mail fraud charges here, the indictment must allege that the funds for the kickbacks came from or was intended to come from the purchase or sale of securities to Power's customers."

On page 4 —

THE COURT: I think I am with you now. Go ahead.

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MR. BUCK: On page 4, your Honor, you quote paragraph 25 of the indictment, paragraph 25 of the indictment states, "Nemelka agreed to secretly pay Marchese, Sandberg kickbacks from the sale of securities," and then lower you say, "Furthermore, the kickbacks which Nemelka allegedly paid to Marchese and Sandberg came from the sale of securities to Power's customers." The indictment does not allege that the kickbacks came from the sale of securities to Power's customers, the indictment alleges that there was an agreement to do that and not that the payments actually came. The indictment fails to allege the nexus which the Court has cited earlier.

THE COURT: Defense want to respond to that?

MR. WATERS: Your Honor, this Court has — let me say that the government has taken the position in the papers filed with this Court, and I am quoting, that, "Power's customers' money was used in the kickback scheme because," quote, "Powers sold the stock short and therefore used its customers' funds to pay Nemelka for that stock."

Now I concede to the Court that that's not in the indictment, but the point is that is their interpretation of what the indictment says, and that interpretation was in the papers filed with this Court, and I believe the Court will find that in their motion to dismiss. Now — excuse me.

THE COURT: Mr. Nemelka, sit down, sir.

MR. WATERS: Your Honor, and I think what has happened here is the Court has ruled that the indictment is facially sufficient and it is now looking at really a piece of evidence, and that is as a stipulation, an admission by the government that this is — we

stipulate this is what our evidence will show. I mean I think that's really the posture that we're in now.

THE COURT: That's exactly right. I've said that before. What this is — I have tried to indicate that I think that the indictment is as drawn facially sufficient. It is only when the government's concession on what evidence may be presented is factored into it that we have a problem. The indictment is facially sufficient. It is as sufficient as the indictment in Mr. Shelton's case.

MR. BUCK: Your Honor, if the evidence is insufficient and the Court so finds, the government has no right to appeal; and if that is the Court's finding, then the government would like to go to trial on Monday and show the Court the government's evidence. If it's the Court's ruling that the indictment is insufficient, the government has a right to appeal and can obviously vacate the trial on Monday, and we'll appeal the decision and hear from the Tenth Circuit on this issue.

THE COURT: Run by the second alternative again.

MR. BUCK: If the Court finds that the indictment is insufficient, the government has a right to appeal, and we can —

THE COURT: I can't do that and be intellectual honest. I can't do that.

MR. SCHLIE: I would further propose that the Court has the right under rule 611 with a concession by the — by the government to short circuit the whole case. I mean the Court has the right to control the receipt of evidence. If the government's concession is that connection which the Court has now ruled must

be shown cannot be, there is no rule of law that says we have to sit here for no apparent purpose, and I think — that's the same ruling that the Court made in the Western Monetary case when we were presented with a parade of witnesses who were going to testify as to the same material that we had heard from the last parade. And, you know, procedurally the Court is correct, and unless the government gives them the question — but I think the Court does have options once this case begins.

THE COURT: All right. We'll go to trial on Monday. You've gotten a ruling as to the law of the case. We'll go to trial on Monday. Okay. Let's see, Monday what time? 9 o'clock.

MR. RAFFERTY: Yes, sir.

THE COURT: All right.

(Proceedings concluded at 11:30 a.m.)

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 6th day of May, 1994.

s/ Gwen Daniel
Gwen Daniel, CSR, CM

APPENDIX F — INDICTMENT FILED JANUARY 7, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 93-CR-008

UNITED STATES OF AMERICA

Plaintiff,

v.

RICHARD T. MARCHESE, ORVILLE LEROY SANDBERG, DAVID R. NEMELKA, and LAURA LEE SORENSON,

Defendants.

INDICTMENT
18 U.S.C. §§ 1341, 1956 and 2

COUNTS 1 - 18

The Grand Jury charges that:

1. Beginning on or about May, 1987, and continuing thereafter to on or about January 7, 1993, in the State and District of Colorado and elsewhere, Defendants RICHARD T. MARCHESE (MARCHESE), ORVILLE LEROY SANDBERG (SANDBERG), DAVID R. NEMELKA (NEMELKA), and LAURA LEE SORENSON (SORENSON) intended to devise and devised a scheme to defraud Power Securities Corporation's customers of their money and property.

2. At all times relevant to the allegations contained in these counts, the Defendant MARCHESE was an owner and director of Power Securities Corporation (Power). MARCHESE had overall responsibility for the management of the firm and, among other things, was in charge of customers' purchases and sales and stock recommendations.

3. At all times relevant to the allegations contained in these counts, the Defendant SANDBERG was an owner, officer and director of Power. SANDBERG had overall responsibility for all securities trading conducted by Power.

4. At all times relevant to the allegations contained in these counts, Power (Power) was registered as a broker-dealer with the Securities and Exchange Commission (SEC) and the National Association of Securities Dealers (NASD). Power's headquarters were in Denver, Colorado and Las Vegas, Nevada from May, 1987, to March, 1989. The firm operated approximately 15 branch offices in Colorado, Georgia, California, Illinois, New York, Nevada, and Florida with over 1,000 brokers and approximately 40,000 customers. On February 13, 1989, Power voluntarily terminated its operations. Power specialized in the sale of selected low-priced securities, commonly referred to as penny stocks.

5. At all times relevant to the allegations contained in these counts, the Defendant NEMELKA was a Mapleton, Utah businessperson whose primary business was the promotion of mergers and acquisitions between private businesses and publicly traded corporations and the promotion of the corporations penny stocks.

6. On November 29, 1972, the United States District Court

for the District of Utah issued an order of permanent injunction against DAVID R. NEMELKA restraining further violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. On November 29, 1973, the United States District Court for the District of New Jersey entered a Judgement permanently enjoining DAVID R. NEMELKA from further violating the anti-fraud provisions of the Securities Exchange Act of 1934 and the registration provisions of the Securities Act of 1933. On January 16, 1973, the Securities and Exchange Commission barred DAVID R. NEMELKA from being associated with any broker-dealer. At all times relevant to the allegations contained in these counts the permanent injunctions and SEC order remained in effect.

7. At all times relevant to the allegations contained in these counts, the Defendant SORENSON was a West Jordan, Utah businessperson with offices in Springville, Utah. She owned and operated Lauraco, Inc. (Lauraco), and Wasatch Investments of Colorado, Inc. (Wasatch). Lauraco provided secretarial and bookkeeping services to NEMELKA and his business entities.

8. At all times relevant to the allegations contained in these counts, Eric Monchecourt, who is not indicted herein, was an owner, officer and director of Power. Monchecourt had responsibility for sales and training.

9. At all times relevant to the allegations contained in these counts, MARCHESE controlled the following business entities among others: Ven Roc Capital Corporation (Ven Roc); Commitment to Excellence, Inc. (Commitment); Double Diamond Oil and Gas, Inc. (Double Diamond); Debton Pipe Line Company, Inc. (Debton); Imperial Power Partners (Imperial Power); Imperial Consultants, Inc. (Imperial Cons.); Citadel Capital, Ltd. (Citadel); and Orleans Limited (Orleans).

10. At all times relevant to the allegations contained in these counts, SANDBERG controlled the business entity Hughes Oil Corporation (Hughes Oil).

11. At all times relevant to the allegations contained in these counts, NEMELKA controlled the following business entities, among others: D & I Enterprises Limited (D & I); December Corporation (December); Family Ventures, Inc. (Family); Independent Ventures, Inc. (Independent); Mapleton Investments, Inc. (Mapleton); Mapleton Investments, Inc., Target Benefit Retirement Plan and Trust (Mapleton Ret. Plan); Mapleton Investments of Colorado, Inc. (Mapleton Colo.); Nemco Associates, Inc. (Nemco); Nemelka Family Trust (Nemelka Family); Seven Tribes of David, Inc. (Seven Tribes); Summer Ventures, Inc. (Summer); Wagon Wheel Ranch, Inc. (Wagon Wheel); and Nez Perce Stud (Nez Perce).

12. At all times relevant to the allegations contained in these counts, Allied Capital Group, Inc. (Allied) was registered as a broker-dealer with the SEC and the NASD. Allied's headquarters was in Englewood, Colorado. At its peak, Allied had a sales force of over 100 brokers. Allied had branch offices in Pompano Beach, Fort Lauderdale, Wellington, and Tampa, Florida. On or about November 17, 1989, Allied ceased operations.

13. At all times relevant to the allegations contained in these counts, FinNet Securities, Inc. (FinNet) was a broker-dealer headquartered at Englewood, Colorado. FinNet was registered as a broker-dealer with the SEC and the NASD.

14. At all times relevant to the allegations contained in these counts, RAF Financial Corporation (RAFCO) was a broker-dealer headquartered at Denver, Colorado and was registered

with the SEC and the NASD. RAFCO was formerly known as E. J. Pittock and Company, Inc. Through its subsidiary, RFC Clearing, RAFCO was the paying and clearing agent for all trades conducted by Power.

15. At all times relevant to the allegations contained in these counts, Miller Diversified Corporation (Miller) was a publicly traded penny stock available for purchase and sale by the investing public on May 5, 1987. Miller was a Nevada corporation based in Greeley, Colorado. The primary asset of Miller was a two year lease with a cattle feedlot operation located near Greeley, Colorado.

16. At all times relevant to the allegations contained in these counts, Genexus International, Inc. (Genexus) was a publicly traded penny stock available for purchase and sale by the investing public on February 6, 1987. Genexus was a Utah corporation based in Salt Lake City, Utah. Genexus helped new business entities involved in high-technology and bio-technology research and development get started.

17. At all times relevant to the allegations contained in these counts, AST Group, Inc. (AST) was a publicly traded penny stock available for purchase and sale by the investing public on June 21, 1988. AST was a Delaware corporation based in El Cajon, California. AST owned, leased, and operated a network of snack food and beverage vending machines.

18. At all times relevant to the allegations contained in these counts, The Westwind Group, Inc. (Westwind), was a publicly traded penny stock available for purchase and sale by the investing public on November 2, 1987. Westwind was a Delaware corporation based in Los Angeles, California.

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Westwind was primarily engaged in the business of producing and licensing low budget motion pictures.

THE SCHEME TO DEFRAUD

19. Beginning on or about May, 1987, and continuing thereafter to on or about January 7, 1993, Defendants MARCHESE, SANDBERG, NEMELKA, and SORENSON, together with others, engaged in an unlawful scheme to defraud Power's customers of their money and property by inducing those customers to purchase and sell penny stocks through the use of materially false or misleading statements or omissions, that is: falsely representing to Power's customers that Power was acting in the best interests of their customers by recommending the purchase and sale of certain publicly traded securities when in fact, the defendants failed to disclose that Nemelka secretly controlled those stocks and Nemelka was paying kickbacks to Marchese, Sandberg and others to retail Nemelka-controlled securities.

20. As part of said scheme, NEMELKA secretly controlled the free trading stock of Miller, Genexus, AST, and Westwind, which were all listed for trading in the Pink Sheets.

21. As part of said scheme, NEMELKA and SORENSON acquired control of Miller, Genexus, AST and Westwind by among other things, accumulating control of the stock certificates of the public corporations.

22. As part of said scheme, NEMELKA and SORENSON transferred stock certificates they accumulated for Miller, Genexus, AST and Westwind to brokerage accounts in Canada and the United States.

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23. As part of said scheme, MARCHESE, SANDBERG and others acting at the defendants direction sent brochures to potential customers which fraudulently stated:

> Power Securities Corporation is a business which was founded on the trust of investors, and has prospered because we have their interest in mind.

24. As part of said scheme, MARCHESE, SANDBERG and others acting at the defendants direction sent brochures to potential customers which fraudulently stated:

> We built Power Securities Corporation as a business with three basic rules as our foundation . . . the exact foundation that the great industries of our nation were built on:
>
> Rule 1. The Client comes First. We have to handle his Money as if it is our last dollar.
>
> Rule 2. The Broker comes Second. He has to work hard every day and night to keep his clients fully informed.
>
> Rule 3. The House comes Last. We must treat our brokers with respect and give them full support in their efforts to honor rule Number One. We will make no "profit" at the expense of Number One or Number Two.

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25. As part of said scheme, MARCHESE, SANDBERG and others acting at the defendants' direction instructed the brokers at Power to recommend the purchase and sale of securities which were secretly controlled by NEMELKA. These securities included but were not limited to Miller, AST, Genexus, and Westwind. As consideration for Power purchasing and selling NEMELKA-controlled securities, NEMELKA agreed to secretly pay MARCHESE, SANDBERG, and Monchecourt kickbacks from the sale of the securities. MARCHESE, SANDBERG, and Monchecourt did not inform branch managers or brokers or Power's customers that NEMELKA secretly controlled Miller, AST, Genexus and Westwind and that they were receiving kickbacks from NEMELKA.

26. As part of said scheme, MARCHESE, SANDBERG, NEMELKA and SORENSON and others caused the purchase and sale of the following NEMELKA-controlled securities:

Company	Approximate Number of Securities Sold Through Nemelka Related Accounts	Approximate Number of Securities Purchased by Power
Miller	18,643,000	18,895,000
Genexus	62,405,500	82,562,310
AST	254,467,878	348,335,546
Westwind	13,533,000	21,929,120

27. As part of said scheme and between on or about May 21, 1987, and February 12, 1989, MARCHESE directed his branch managers and brokers at Power to recommend the purchase and sale of Miller's common stock to Power's customers. More than 4,000 of Power's customers purchased approximately 58,175,406 shares of Miller and paid approximately

$10,463,951.00 in stock or cash. Power's customers who purchased Miller included but are not limited to the following:

Customer	Purchase Date	No. of Shares	Cost
Nick Mondello	6/5/87	12,000	$ 1,500.00
Larry Grinage	6/16/87	10,000	1,260.00
John Harrigan	7/17/87	2,500	535.00
Dennis Castor	7/23/87	1,000	220.00
Suzanne Masters	8/3/87	7,200	2,035.00
Chris Duff	9/30/87	40,000	11,260.00
Christopher Calille	10/5/87	2,000	572.50
Ronald Culver	10/7/87	3,400	996.00
W.D. Smith	10/26/87	37,600	12,418.00
Robert Hedgecock	11/05/87	3,000	1,000.00
Donna J. Herzog	11/16/87	5,400	2,010.00
Evelyn Kautzer	1/6/88	5,000	1,310.00
Margaret Schuster	1/11/88	10,000	2,600.00
Russell Pomeroy	1/13/88	24,600	6,416.00
James Masacek	1/18/88	4,000	1,040.00
Lucille Sitzman	1/18/88	3,900	1,024.00
Kenneth Armstrong	1/22/88	8,000	2,090.00
Howard Woods	3/3/88	10,000	3,145.00
Bernie Samuels	3/25/88	5,000	1,870.00
Dale Howell	4/19/88	2,800	1,070.00
Lee W. Cook	4/22/88	6,600	2,495.00
Frank Burns	1/11/89	28,000	1,980.00

28. As part of said scheme and between on or about August 14, 1987 and February 12, 1989, MARCHESE directed his branch managers and brokers at Power to recommend the purchase and sale of Genexus common stock to Powers customers. More than 7,700 of Power's customers purchased

approximately 392,567,939 shares of Genexus common stock and paid approximately $20,981,563.00 in stock or cash. Power's customers who purchased Genexus included but are not limited to the following:

Customer	Purchase Date	No. of Shares	Cost
Laura (Schell) Flanders	5/18/88	30,000	$4,520.00
Robert E. Hall	7/06/88	25,000	4,500.00
Lucille Sitzman	7/27/88	11,000	2,110.00
Carole Palumbo	7/29/88	7,000	1,070.00
Evelyn Kautzer	7/29/88	6,500	995.00
William Petersen	11/10/88	50,000	1,520.00
Ray Ciaccio	11/10/88	50,000	1,520.00
John Kreizenbeck	11/10/88	50,000	1,520.00
Sam Genovese	11/17/88	50,000	1,520.00
Cindy Pilkington	11/23/88	165,000	4,970.00
Dale Sager	11/25/88	150,000	4,520.00
Lynn Powell	11/25/88	30,000	920.00
James Weaver	12/02/88	65,000	1,970.00

29. As part of said scheme and between on or about July 28, 1988, and February 12, 1989, MARCHESE directed his branch managers and brokers at Power to recommend the purchase and sale of AST units, warrants and common stock to Power's customers. More than 5,800 of Power's customers purchased approximately 670,103,283 of AST units, warrants and common stock and paid approximately $16,632,657.00 in stock or cash. Power's customers who purchased AST included but are not limited to the following:

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Customer	Purchase Date	No. of Shares	Cost
Michael Wathen	8/9/88	50,000	$820.00
Benjamin Kolacny	8/11/88	63,000	1,008.00
Eugene Motta	8/11/88	184,500	3,020.00
Sally Robinson	8/12/88	33,300	1,000.00
Sam Genovese	8/17/88	50,000	1,520.00
Emma Zabel	8/17/88	80,000	2,420.00
Michael Henekin	8/17/88	50,000	1,520.00
Lynn Powell	8/24/88	50,000	1,520.00
David Conrad	8/24/88	30,000	920.00
John Goss	8/26/88	35,000	1,070.00
Joseph Towers	8/30/88	35,000	1,070.00
Robert E. Hall	9/13/88	1,200,000	30,000.00

30. As part of said scheme and between on or about March 14, 1988, and February 12, 1989, MARCHESE directed his branch managers and brokers at Power to recommend the purchase and sale of Westwind units, warrants and common stock to Power's customers. More than 3,300 of Power's customers purchased approximately 75,241,038 of Westwind units, warrants and common stock and paid approximately $11,374,938-00 in stock or cash. Power's customers who purchased Westwind included but are not limited to the following:

Customer	Purchase Date	No. of Shares	Cost
Tony Buscemi	3/18/88	10,200	$ 1,550.00
Tom Burke	3/18/88	10,000	1,520.00
Henry J. Crawford	3/18/88	10,200	1,550.00
Jeffrey J. Sands	3/18/88	33,500	5,045.00
Nick Mondello	3/18/88	10,000	1,520.00

Appendix F

Customer	Purchase Date	No. of Shares	Cost
Howard Woods	3/22/88	50,000	4,020.00
Lee W. Cook	3/25/88	7,000	1,070.00
Lynn Powell	3/25/88	5,000	770.00
Bernie Samuels	3/25/88	10,000	1,520.00
Evelyn Kautzer	3/31/88	10,000	1,820.00
Robert E. Hall	9/23/88	40,000	10,000.00

31. As part of said scheme, and on or about the dates listed below MARCHESE, SANDBERG, and Monchecourt secretly received $3,064,895.00 in kickbacks from NEMELKA, SORENSON and others acting at their direction which are more particularly described as follows:

Date	Amount	Payor	Payee
6/5/87	$57,960.00	Mapleton	Ven Roc
6/10/87	14,000.00	Lauraco	Ven Roc
6/16/87	27,000.00	Mapleton	Ven Roc
7/02/87	40,000.00	Mapleton	Ven Roc
7/31/87	30,000.00	Mapleton	Ven Roc
8/13/87	50,000.00	Mapleton	Ven Roc
9/10/87	20,000.00	Nemco	Ven Roc
10/24/87	25,935.00	Dansco	Ven Roc
11/10/87	25,000.00	Mapleton	Ven Roc
1/28/88	50,000.00	Mapleton	Imperial Power
1/29/88	50,000.00	Lauraco	Imperial Power
2/02/88	50,000.00	Dansco	Imperial Power
2/03/88	50,000.00	Lauraco	Commitment
2/05/88	25,000.00	Lauraco	Commitment
2/08/88	50,000.00	Dansco	Commitment
4/11/88	25,000.00	Nemco	Ven Roc
4/11/88	25,000.00	Wagon Wheel	Ven Roc

Appendix F

Date	Amount	Payor	Payee
4/11/88	25,000.00	Mapleton	Ven Roc
4/11/88	25,000.00	D & I	Ven Roc
5/13/88	25,000.00	Mapleton	Imperial Partners
5/21/88	25,000.00	Mapleton (Colorado)	Imperial Cons.
5/23/88	25,000.00	Mapleton	Imperial Cons.
5/25/88	25,000.00	Nemco	Imperial Cons.
6/02/88	25,000.00	D & I	Imperial Cons.
6/07/88	25,000.00	Lauraco	Imperial Cons.
6/07/88	50,000.00	D & I	Imperial Cons.
6/07/88	25,000.00	Wagon Wheel	Imperial Cons.
6/07/88	25,000.00	Mapleton (Colorado)	Imperial Cons.
6/09/88	25,000.00	Wagon Wheel	Imperial Cons.
6/09/88	25,000.00	Mapleton	Imperial Cons.
6/09/88	50,000.00	Mapleton (Colorado)	Imperial Cons.
8/11/88	25,000.00	Mapleton (Ret. Plan)	Debton
8/12/88	500,000.00	Mapleton (Ret. Plan)	Debton
8/11/88	95,000.00	Mapleton (Ret. Plan)	Double Diamond
8/12/88	370,000.00	Nemelka Family	Double Diamond
8/12/88	60,000.00	Mapleton (Ret. Plan)	Double Diamond
1/18/89	1,000,000.00	Marlen Johnson	Citadel

32. As part of said scheme, NEMELKA, MARCHESE and Monchecourt agreed to establish Double Diamond and Debton for concealing kickbacks.

33. As part of said scheme and on or about the dates listed below, MARCHESE paid $496,635.67 to SANDBERG which was his share of the kickbacks from NEMELKA which are more particularly described below:

Appendix F

Date	Amount
6-09-87	$ 19,320.00
6-12-87	4,667.67
7-10-87	9,000.00
7-10-87	13,335.00
8-07-87	10,000.00
8-31-87	16,667.00
9-17-87	6,667.00
11-09-87	8,645.00
11-10-87	8,334.00
9-08-88	50,000.00
9-08-88	350,000.00

34. As part of said scheme, and on or about August 30, 1988, MARCHESE, SANDBERG and Monchecourt caused Debton Pipe Line Company, Inc. to purchase 12 of the outstanding shares of Hughes Oil Company for $350,000.00 to conceal the payment of SANDBERG's share of the NEMELKA kickbacks.

35. As part of said scheme, and on or about February 5, 1988, NEMELKA secretly loaned MARCHESE $100,000.00 to meet Power's net capital requirements.

36. As part of said scheme, MARCHESE and others secretly arranged for Allied and FinNet to purchase and sell NEMELKA-controlled securities.

37. As part of said scheme, and between May 1987, and January 7, 1993, MARCHESE, SANDBERG, NEMELKA and SORENSON concealed and misrepresented the purposes of and the acts done in furtherance of the scheme to defraud.

38. The allegations in Paragraphs 1 through 37 are incorporated by reference in each of Counts 1 through 18.

Appendix F

39. On or about the dates set forth below, in the State and District of Colorado and elsewhere, Defendants RICHARD T. MARCHESE, ORVILLE LEROY SANDBERG, DAVID R. NEMELKA, and LAURA LEE SORENSON, for the purpose of executing the above-described scheme and attempting to do so, knowingly caused certain envelopes to be delivered by the U.S. Postal Service according to the directions thereon, which mailings are more particularly described as follows:

Appendix F

Count	Date of Mailing	Customer	Contents	Address
1	1/8/88	Evelyn Kautzer	Check #5879	Power Securities Corp. 51525 S. College Ave. Ft. Collins, Co 80525
2	1/14/88	Russell Pomeroy	Miller Confirmation	1560 Broadway, Suite 1580 Denver, CO 80202
3	1/19/88	Lucille Sitzman	Miller Confirmation	2776 S. Heathergarden Aurora, CO 80014
4	1/23/88	Kenneth Armstrong	Miller Confirmation	18713 E. Brown Pl. Aurora, CO 80013
5	3/4/88	Howard Woods	Miller Confirmation	2722 Meade St. Denver, CO 80236
6	3/26/88	Bernie Samuels	Miller Confirmation	1100 Bellaire Broomfield, CO 80020

Appendix F

Count	Date of Mailing	Customer	Contents	Address
7	4/20/88	Dale K. Howell	Miller Confirmation	8332 E. Briarwood Blvd Englewood, CO 80112
8	4/23/88	Lee Cook	Miller Confirmation	8159 N. Flower Cir. Arvada, CO 80005
9	5/12/88	Laura (Schell) Flanders	Genexus Confirmation	1145 Princeton Dr. Longmont, CO 80501
10	7/23/88	Carole Palumbo	Genexus Confirmation	56 Saddle Rd. Niewalk, CT 06851
11	11/8/88	William Peterson	Check #4797	Power Securities Corp. 3307 S. College Ave. Suite 200 Ft. Collins, CO 80525
12	11/14/88	Sam Genovese	Check #1134	Power Securities Corp. 3307 S. College Ave. Suite 200 Ft. Collins, CO 80525

Appendix F

Count	Date of Mailing	Customer	Contents	Address
13	12/6/88	James Weaver	Check #325	Power Securities Corp. 3307 S. College Ave. Suite 200 Ft. Collins, CO 80525
14	8/10/88	Michael Wathen	AST Confirmation	2117 S. Adams Denver, CO 80210
15	8/12/88	Eugene Motta	AST Confirmation	995 S. Chase St. Lakewood, CO 80226
16	8/18/88	Emma Zabel	AST Confirmation	9065 Lander St. Denver, CO 80030
17	8/24/88	Joseph Towers	Check #1247	Power Securities Corp. 3307 S. College Ave. Suite 200 Ft. Collins, CO 80525
18	9/14/88	Robert Hall	AST Confirmation	P.O. Box 490 Lake City, CO

The foregoing was in violation of Title 18, United States Code, Sections 1341 and 2.

COUNTS 19 - 22

The grand jury further charges:

40. The allegations in Paragraphs 1 through 39 are incorporated by reference in each of Counts 19 - 22.

41. On or about May 21, 1987, through on or about February 12, 1989, in the State and District of Colorado, the Defendants, RICHARD T. MARCHESE, ORVILLE LEROY SANDBERG, and DAVID R. NEMELKA knowingly and willfully caused to be transported the monetary instruments, that is, the investment securities described below, from a place outside the United States, that is, Yorkton Securities in Vancouver, Canada, to a place in the United States, that is, Rafco, in Denver, Colorado acting at the direction of Power, with the intent to promote the carrying on of specified unlawful activity, that is, mail fraud in violation of Title 18, United States Code, Section 1341 as described in Counts 1 through 18.

Count	Date	Security	Shares	Cert. #
19	1/20/88	Miller	100,000	2491
20	1/27/88	Miller	500,000	2571
21	7/29/88	Genexus	1,000,000	4709
22	8/17/88	AST	16,000,000	1013

The foregoing was in violation of Title 18, United States Code, Sections 1956(a)(2)(A) and 2.

Appendix F

COUNTS 23 - 25

The grand jury further charges:

42. The allegations in Paragraphs 1 through 39 are incorporated by reference in each of Counts 23 - 25.

43. On or about May 21, 1987, through on or about February 12, 1989, in the State and District of Colorado, the Defendants, RICHARD T. MARCHESE, ORVILLE LEROY SANDBERG, and DAVID R. NEMELKA knowingly and willfully caused to be transported the monetary instruments, that is, the investment securities described below, from a place outside the United States, that is, Pacific International Securities in Vancouver, Canada, to a place in the United States, that is, Rafco, in Denver, Colorado acting at the direction of Power, with the intent to promote the carrying on of specified unlawful activity, that is, mail fraud in violation of Title 18, United States Code, Section 1341 as described in Counts 1 through 18.

Count	Date	Security	Shares	Cert. #
23	7/29/88	Genexus	964,300	4725
24	8/19/88	AST	5,000,000	1139
25	8/22/88	AST	333,333	1124

The foregoing was in violation of Title 18, United States Code, Sections 1956(a)(2)(A) and 2.

COUNTS 26 - 30

The grand jury further charges:

44. The allegations in Paragraphs 1 through 39 are incorporated by reference in each of Counts 26 through 30.

Appendix F

45. On or about May 21, 1987, through on or about February 12, 1989, in the State and District of Colorado, the Defendant DAVID R. NEMELKA knowingly and willfully conducted and attempted to conduct and caused to be conducted financial transactions affecting interstate and foreign commerce, that is, the wire transfer of funds and the transfer of checks as described below, which involved the proceeds of a specified unlawful activity, that is, mail fraud in violation of Title 18, United States Code, Section 1341 as described in Counts 1 through 18, knowing that the transaction was designed in whole or in part to conceal and disguise the source, ownership and control of the proceeds of said specified unlawful activity and that while conducting and attempting to conduct and causing to be conducted such financial transactions, knew that the property involved in the financial transactions, that is, funds in the amounts set forth below, represented the proceeds of some form of unlawful activity.

Appendix F

Count	Date	From	To	Financial Transaction	Amount
26	1/29/88	Yorkton Sec.	Dansco	wire	$ 74,990.00
27	2/2/88	Dansco	Imperial Power	check	50,000.00
28	2/5/88	Yorkton Sec.	Dansco	wire	191,602.43
29	2/5/88	Dansco	Commitment	check	50,000.00
30	2/9/88	Dansco	W.F. Mara Co.	check	10,000.00

Appendix F

The foregoing was in violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 2.

COUNTS 31 - 34

The grand jury further charges:

46. The allegations in Paragraphs 1 through 39 are incorporated by reference in each of Counts 31 through 34.

47. On or about May 21, 1987, through on or about February 12, 1989, in the State and District of Colorado, Defendants RICHARD T. MARCHESE AND ORVILLE LEROY SANDBERG knowingly and willfully conducted and attempted to conduct and caused to be conducted financial transactions affecting interstate and foreign commerce, that is, the wire transfer of funds and the transfer of checks as described below, which involved the proceeds of a specified unlawful activity, that is, mail fraud in violation of Title 18, United States Code, Section 1341 as described in Counts 1 through 18, knowing that the transaction was designed in whole or in part to conceal and disguise the source, ownership and control of the proceeds of said specified unlawful activity and that while conducting and attempting to conduct and causing to be conducted such financial transactions, knew that the property involved in the financial transactions, that is, funds in the amounts set forth below, represented the proceeds of some form of unlawful activity.

Count	Date	From	To	Financial Transaction	Amount
31	8/24/88	Debton	Rafco	wire	$500,000.00
32	08/24/88	Double Diamond	Power	wire	500,000.00
33	8/24/88	Debton	Hughes Oil	check	350,000.00
34	9/8/88	Ven Roc	Sandberg	check	50,000.00

Appendix F

The foregoing was in violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 2.

A TRUE BILL
s/ Karen A. Eastwood
FOREPERSON

MICHAEL J. NORTON
United States Attorney

s/ Gerald J. Rafferty
By: Gerald J. Rafferty
Assistant U.S. Attorney

s/ Kenneth R. Buck
By: Kenneth R. Buck
Assistant U.S. Attorney

APPENDIX G — WAIVER OF JURY TRIAL FILED FEBRUARY 18, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Criminal Action No. 93-CR-8-B

UNITED STATES OF AMERICA,

Plaintiff,

v.

LAURA LEE SORENSON,

Defendant.

WAIVER OF TRIAL BY JURY

I acknowledge that I was fully informed of my right to trial by jury in this cause. I hereby waive that right, and request the court to try all issues of fact and law without a jury.

DATED at Denver, CO, this 18 day of February, 1994.

s/ Laura Lee Sorenson
Defendant

APPROVED:

s/ David Kaplan
Attorney for Defendant

Appendix G

The United States of America consents to the defendants' waiver of a jury trial and the right to request special findings.

s/ Gerald J. Rafferty
Assistant United States Attorney

I find that the defendant has knowingly and voluntarily waived the right to jury trial, and the waiver is approved.

s/ Lewis T. Babcock
Lewis T. Babcock, Judge

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 93-CR-8

Certificate of Mailing

A copy of this order was sent on Feb. 18, 1994 to the following:

Kenneth R. Buck
Gerald Rafferty
Assistant U.S. Attorney
1961 Stout Street
Denver, CO 80294

Joseph Saint-Veltri, Esq.
Leonard Davies, Esq.
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Denver, CO 80203

Richard T. Marchese
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Laura Lee Sorenson
2025 Oakwood Pl.
West Jordan, UT 84088

s/ Carol Henderson
Deputy Clerk

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Criminal Action No. 93-CR-8-B

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD T. MARCHESE,

Defendant.

WAIVER OF TRIAL BY JURY

I acknowledge that I was fully informed of my right to trial by jury in this cause. I hereby waive that right, and request the court to try all issues of fact and law without a jury.

DATED at Denver, this 18 day of Feb., 1994.

s/ Richard T. Marchese
Defendant

APPROVED:

s/ Leonard E. Davies
Attorney for Defendant

Appendix G

The United States of America consents to the defendants' waiver of a jury trial and the right to request special findings.

s/ Gerald J. Rafferty
Assistant United States Attorney

I find that the defendant has knowingly and voluntarily waived the right to jury trial, and the waiver is approved.

s/ Lewis T. Babcock
Lewis T. Babcock, Judge

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 93-CR-8

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West Jordan, UT 84088

s/ Carol Henderson
Deputy Clerk

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Criminal Action No. 93-CR-8-B

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID R. NEMELKA,

Defendant.

WAIVER OF TRIAL BY JURY

I acknowledge that I was fully informed of my right to trial by jury in this cause. I hereby waive that right, and request the court to try all issues of fact and law without a jury.

DATED at Denver, CO, this 18 day of Feb., 1994.

s/ David R. Nemelka
Defendant

APPROVED:

s/ Stephen Waters
Attorney for Defendant

Appendix G

The United States of America consents to the defendants' waiver of a jury trial and the right to request special findings.

s/ Gerald J. Rafferty
Assistant United States Attorney

I find that the defendant has knowingly and voluntarily waived the right to jury trial, and the waiver is approved.

s/ Lewis T. Babcock
Lewis T. Babcock, Judge

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 93-CR-8

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West Jordan, UT 84088

s/ Carol Henderson
Deputy Clerk

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Criminal Action No. 93-CR-8-B

UNITED STATES OF AMERICA,

Plaintiff,

v.

ORVILLE LEROY SANDBERG,

Defendant.

WAIVER OF TRIAL BY JURY

I acknowledge that I was fully informed of my right to trial by jury in this cause. I hereby waive that right, and request the court to try all issues of fact and law without a jury.

DATED at Denver, Colorado, this 18 day of February, 1994.

s/ Orville Leroy Sandberg
Defendant

APPROVED:

s/ John H. Schlie
Attorney for Defendant

Appendix G

The United States of America consents to the defendants' waiver of a jury trial and the right to request special findings.

s/ Kenneth R. Buck
Assistant United States Attorney

I find that the defendant has knowingly and voluntarily waived the right to jury trial, and the waiver is approved.

s/ Lewis T. Babcock
Lewis T. Babcock, Judge

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 93-CR-8

Certificate of Mailing

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s/ Carol Henderson
Deputy Clerk

APPENDIX H — COURT CONSENT TO WAIVER OF JURY TRIAL FILED FEBRUARY 23, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Criminal Action No. 93-CR-8-B

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD T. MARCHESE, ORVILLE LEROY SANDBERG, DAVID R. NEMELKA, and LAURA LEE SORENSON,

Defendants.

ORDER

At the hearing on February 18, 1994, the court ordered as follows:

1. Trial to jury has been waived by all defendants, consented to by the government, and will now be tried to the Court.

2. The trial is continued from March 7, 1994 to Monday, March 21, 1994.

3. Status conference set for Monday, February 28, 1994 at 2:00 p.m.

Appendix H

BY THE COURT:

s/ Lewis T. Babcock
Lewis T. Babcock, Judge

DATED: February 23, 1994

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 93-CR-8

Certificate of Mailing

A copy of this order was sent on Feb. 18, 1994 to the following:

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Gerald Rafferty
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s/ Carol Henderson
Deputy Clerk

APPENDIX I — PLEADING CONTAINING GOVERNMENTAL JUDICIAL ADMISSION FILED MARCH 15, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 93-CR-008-B

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD MARCHESE, DAVID R. NEMELKA, LAURA LEE SORENSON, and ORVILLE LEROY SANDBERG,

Defendants.

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION FOR CLARIFICATION

The United States of America, by and through Henry L. Solano, United States Attorney for the District of Colorado and Gerald J. Rafferty and Kenneth R. Buck, Assistant United States Attorneys, hereby submits its response to Defendants' Motion for Clarification.

On March 11, 1994, Defendants Nemelka, Sorenson and Sandberg filed a Motion for Clarification of the Law of the Case. Although styled as a Motion for Clarification, the defendants have in effect filed a Motion for Summary Judgment or a Motion to Dismiss the Indictment.

Appendix I

The defendants claim that the law requires "that the funds for the alleged kickbacks came from or were intended to come from the purchase or sale of securities to those eighteen Power customers that are the subjects of Counts 1-18 of the Indictment." (p. 8, Motion for Clarification) The defendants rely on *McNally v. United States,* 483 U.S. 350 (1987) and its progeny for the proposition that a nexus between the kickbacks and the sale of stock to Power's customers is required to place at risk a property right of Power's customers. *McNally* and its progeny, including, *United States v. Shelton,* 848 F.2d 1485 (10th Cir. 1988) do not involve payments by the victims of the fraud and are inapplicable to the instant case. The government did not allege and will not prove that the funds for the kickbacks from Nemelka to Marchese and Sandberg came from the sale of securities to any Power customers, including those customers listed in Counts 1-18.

ISSUE PRESENTED

The issue to be decided by the Court is whether the money which Power's customers paid for their stock as a result of the alleged fraud is a sufficient property interest to sustain the government's burden that a property right of Power's customers was taken or placed at risk under *McNally.*

STATEMENT OF THE CASE

Power's customers were defrauded of their money when Power induced those customers to send their money to Power to buy stock based on materially false statements and omissions. The law does not require proof of loss to the customers or proof of some particular use of the customer's money by the defendants. The government will show that Power made materially false statements and omissions to the customers listed in paragraph 39

of the indictment before those customers sent their money to Power. That is all the government is required to plead and prove.

Power, as the customer's fiduciary, was required to act in its customer's best interests. This included providing the customer with honest investment advice and delivering stock to the customer at the lowest available price. Power's fiduciary duty is premised on being agents who solicited their customers to purchase stock and their receipt of customers' money. Power's customers were defrauded when they paid Power for honest investment advice and stock at its lowest price because the customers received neither. This fraud directly implicates the customers' property right because they did not receive full value for their money.

Power's customers did not receive honest investment advice because they were not informed that the promoter, Nemelka, controlled the free trading shares of the stock and that Nemelka was paying kickbacks to Power to retail the stock. Power's customers, including those listed in paragraph 39 of the indictment, bought stock from Power during the same time frame that Nemelka sold stock to Power from his original control position, and Nemelka paid Power kickbacks for purchasing his stock. The government need not prove that a particular customer's money was used to pay a kickback. It is sufficient to show that Power deprived its customers of honest investment information and a better price by not informing them of Nemelka's control and the kickback agreement.

FACTS

Consistent with the law the grand jury has alleged the following scheme to defraud:

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1. Marchese and Sandberg were owners and directors of Power. (¶s 2, 3) As Power's co-owners and directors, they had a fiduciary responsibility to disclose material information (the alleged kickbacks) to their customers.[1] (Memorandum Opinion and Order, 12/7/93, p. 4) Power confirmed its fiduciary duty by sending brochures to its customers stating that Power placed their customers' interests first. (¶s 23 & 24)

2. Nemelka secretly controlled the free trading stock of Miller, Genexus, AST and Westwind. (¶ 20) Marchese, Sandberg and Monchecourt secretly received $3,064,895 in kickbacks from Nemelka, Sorenson and others acting at their direction. (¶ 31) Marchese, Sandberg and Monchecourt did not inform branch managers or brokers or Power's customers that Nemelka secretly controlled Miller, AST, Genexus and Westwind and that they were secretly receiving kickbacks from Nemelka. (¶ 25)

3. Power recommended and its customers purchased Miller, Genexus, AST and Westwind. (¶s 27-30) Power defrauded its customers of their money and property by inducing those customers to purchase certain securities through the use of materially false or misleading statements or omissions, that is:

a. Falsely representing to Power's customers that Power was acting in their best interest by recommending the purchase and sale of certain publicly traded securities; (¶s 19, 23, 24)

b. Failing to disclose that Nemelka secretly controlled those stocks; (¶s 19, 25) and

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1. The indictment need not specifically allege that Marchese breached his fiduciary duty to his customers. Moreover, the legal obligation to disclose such kickbacks to his customers is implied. (Order, p. 6)

c. Failing to disclose that Nemelka was paying kickbacks to Marchese, Sandberg and others to retail Nemelka-controlled securities. (¶s 19, 25)

Although the indictment alleges that Nemelka agreed to pay kickbacks from the sale of the securities (¶ 25) the indictment does not allege that Nemelka actually paid the kickbacks from the sale of securities to Power customers. The indictment alleges that Nemelka secretly controlled stock (¶ 20), transferred stock certificates to Canada (¶ 22), secretly paid kickbacks (¶s 25, 31) and concealed the acts done in furtherance of the scheme to defraud (¶ 37). More often than not, the defendants successfully concealed the source of the funds used to pay the kickbacks to Power. The source of the funds used to pay the kickbacks is legally irrelevant for the reasons listed in the argument below.

ARGUMENT

In its December 7, 1993 Memorandum Opinion and Order, the Court framed the issue raised by defendants' Motion to Dismiss the Indictment:

> Thus, the focus of my inquiry here is whether under the government's theory, the mail fraud charges are sustainable because a property right of Power's customers was taken or placed at risk as a result of the alleged fraudulent scheme. If no property right was involved, the mail fraud charges cannot survive. (Order, p. 2)

The Court found "the mail fraud charges survive the defendant's challenge under *McNally* because a property right,

the purchase and sale of stock by Power's customers, was placed at risk by the alleged fraudulent scheme." (Order, p. 4)

In *McNally,* the Supreme Court reversed a mail fraud conviction based on the proposition that mail fraud "clearly protects property rights but does not refer to the intangible rights of the citizenry to good government." 483 U.S. at 356. *McNally* involved a scheme in which government officials gave state insurance business to an insurance agency in return for kickbacks. The alleged victims were the citizens of Kentucky who were deprived of their right to honest government. The Court construed the mail fraud statute to reach only fraud involving money or property. *Id.* at 2881.

In *Carpenter v. United States,* 484 U.S. 19, 25 (1987), the Supreme Court reaffirmed that the right to honest and faithful service is "an interest too ethereal in itself to fall within the protection of the mail fraud statute." However, *Carpenter* expanded the application of the mail fraud statute by including intangible property rights, as well as tangible, "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Id.*

Courts have consistently upheld mail fraud convictions by applying *McNally* to cases in which the fiduciary breached a duty of honesty to the customer and the customer paid money, even though the exact loss could not be determined or traced. In *United States v. Ashman,* 979 F.2d 469 (7th Cir. 1992), *cert. denied,* __ U.S. __, 1145 S. Ct. 62 (1993), the Court affirmed certain mail fraud convictions of traders and brokers of soybean futures contracts at the Chicago Board of Trade. The *Ashman* court concluded that the scheme deprived customers of orders filled by the competitive market and falls within the purview of the mail

fraud statute because, ". . . even though customers may not be entitled to any specific price, deliberate refusal to pursue the best price the broker could obtain can constitute a scheme to defraud." *Id.* at 478. *Ashman* cites cases which "held that shifting or altering of economic risk or opportunity to effect a person's financial position adversely deprives that person of money or property." *Id.* quoting *United States v. Dial*, 757 F.2d 163, 168 (7th Cir. 1985) ("In trading ahead of his customers without telling them what he was doing, he was misleading them for his own profit, and conduct of this type has long been considered fraudulent."); *United States v. Consentino*, 869 F.2d 301, 308 (7th Cir.) (It is not necessary that a plan actually result in financial loss as long as it is aimed at the fraudulent deprivation of some of the victim's money or property), *cert. denied*, 492 U.S. 908 (1989).

The charges in this case are consistent with the holdings in *McNally* and *Carpenter*. In *McNally*, the alleged victims of the scheme — the citizens of Kentucky — were not themselves defrauded of any cognizable property interest. Indeed, the evidence in *McNally* established that the citizens would have paid the same insurance premiums regardless of the kickbacks from the insurance company. *McNally*, 483 U.S. at 360-67. In contrast, the principals here paid money as a *direct* result of Power's materially false statements and omissions.

United States v. Levine, 750 F. Supp. 1433, 1441 (D. Colo. 1990) is easily distinguishable. In *Levine*, a liquidator, by agreement with the creditors, was paid 10% of the liquidation proceeds. By secret agreement, however, the debtors/defendants got 1/3 of the liquidator's cut. In *Levine*, the creditors and liquidators had an arms length commercial relationship and therefore the liquidators did not have a fiduciary duty to disclose to the creditors payments from the liquidators to the debtors. In

contrast, Power's customers did not get what they bargained for and their money was placed at risk.

United States v. Shelton, 848 F.2d at 1493 is likewise distinguishable. In *Shelton,* the scheme to defraud allegedly deprived the citizens of the right to have county business conducted free from corruption and undue influence. *Id.* at 1488. The court concluded, "that the theory of equitable or constructive trust will not save a conviction that is otherwise grounded solely on the deprivation of intangible rights." *Id.* at 1492. The court further concluded that the indictment did not provide any notice that the transfer of money or property from the victim to the defendant was an essential element of mail fraud. *Id.* at 1494. The indictment in this case charges that the victim's (customer's) money was used to purchase certain securities (¶s 19, 27-30).

Similarly, *United States v. Ochs,* 842 F.2d 515, 518 (1st Cir. 1988) is also distinguishable. In *Ochs,* the defendants were charged with mail fraud for depriving the city of Boston of its intangible right to honest and faithful services of its employees. In *Ochs,* the Court interpreted *McNally,* as holding that, "the mere fact a fiduciary profits from a breach of duty is not a sufficient property deprivation to satisfy the requirements of the mail fraud statute if the profit was not, directly or indirectly, at the principals expense." *Id.* at 526. The mail fraud conviction was vacated. In the present case, a sufficient property deprivation exists because Power received money directly from their customers.

Finally, the defendants argue that the kickbacks should be directly connected to the funds of the victims that are named in the mailings. This argument ignores the well-settled law that the use of the mails, to be part of the execution of the fraud, need not be an essential element of the scheme. *Schmuck v. United States,*

489 U.S. 705, 710 (1989). "It is sufficient for the mailing to be 'incident to an essential part of the scheme,' . . . or 'a step in [the] plot." *Id.* at 710-11 (quoting *Badders v. United States,* 240 U.S. 391, 394 (1961)).

CONCLUSION

The government believes that *McNally* and its progeny are distinguishable from the present case because the *McNally* line of cases are based on the intangible loss of the right to honest government and the present case is based on the loss of customer's money. The Court should find that the indictment alleges a sufficient property interest and that the government does not have to prove that the kickbacks from Nemelka to Marchese and Sandberg came from Power's customers.

Respectfully submitted,

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Appendix I

CERTIFICATE OF MAILING

I hereby certify that on this 15 day of March, 1994, I faxed a true and correct copy of the foregoing GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION FOR CLARIFICATION to the following:

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